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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

JOHN A. VENTURA,
Petitioner,

v.

CITY OF INDEPENDENCE;
WALTER ELLERT; DOROTHY ORNAS;
DENNIS MESSINA; GEORGE SPILKER,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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154 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a plaintiff should not be precluded as a matter of law from protection under the Americans with Disabilities Act ("ADA") as a result of involvement in some normal activities.

2. Whether the assessment if an individual is substantially limited in one or more major life activities should be made without regard to mitigating measures such as medicines or assistive or prosthetic devices.

3. Whether a court inappropriately enters summary judgment on an issue not raised or argued by the movant.

PARTIES TO THE PROCEEDING

The petitioner is John Ventura, an individual.

The respondent, City of Independence, is a municipal corporation in Cuyahoga County, Ohio.

The respondents Walter Ellert, Dorothy Ornas, Dennis Messina and George Spilker are individuals and employees of the respondent, City of Independence.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

John Ventura respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, review of which is sought, is unreported and is reproduced in the Appendix attached to this Petition at App. A. The Memorandum and Order of the District Court for the Northern District of Ohio is

unreported and is reproduced in the Appendix attached to this Petition at App. B.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 4, 1997. A timely petition for rehearing and rehearing *en banc* filed by the petitioner was denied on April 18, 1997. (App. C.)

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The statutes involved lie within the Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*, and especially 42 U.S.C. § 12101, 12102, 12111 and 12112. Also the pertinent regulations involved are 29 C.F.R. § 1630.2 and the appendix thereto. Pertinent provisions of these statutes and regulations are reproduced at App. G through L.

STATEMENT OF THE CASE

A. Facts

JOHN VENTURA was employed with the Service Department of the CITY OF INDEPENDENCE from May 1977 until June 21, 1993. (App. B-2, B-7.)

Around 1991, VENTURA developed asthma. (App. B-2, B-3.) With the use of medications (Ventolin, Atrovent and Vanceril), VENTURA was able to continue to do his job and engage in some exercise and other normal activities. (App. A-6, A-7, B-4, D-6, D-7, D-26, D-27; *see, also,* Ventura Depo., p. 103-104, 147-150, 259-262, attached hereto as App. F.) With the asthma, VENTURA was unable to work around diesel fumes, had to avoid extremes in temperature and humidity and had to avoid working irregular hours. (App. A-3, B-3, B-5, D-4, D-5, D-25, D-26.) Despite these restrictions, there were numerous jobs which VENTURA could still perform. (App. D-6, D-7.) Even though the CITY would accommodate other employees in making job assignments, it refused to take consideration of VENTURA's asthma. Indeed, rather than attempting to accommodate his asthma, his supervisors purposely assigned VENTURA to jobs which they knew would provoke his condition. (App. D-9 thru D-11.) In one instance, VENTURA was forced to work outside continuously on a bitterly cold day in February while his co-workers were allowed to warm up in a back-up vehicle. (App. D-12, D-13.)

The CITY demoted VENTURA from Grade I to Grade III because of his asthma. (App. B-5, B-6, D-9.) Grade I and Grade III employees perform essentially

the same tasks. (App. D-1, D-2.) The only real difference is that Grade I employees have supervisory responsibilities. (*Id.*) VENTURA's asthma did not restrict his ability to supervise other employees and he was asked to do so even after his demotion. (App. D-9, D-10.)

Because his employer refused to make any real accommodation for his asthmatic condition, VENTURA was eventually forced to leave his job on June 21, 1993. (App. D-13.)

B. District Court Proceedings

On December 21, 1993, VENTURA initiated this action by filing suit in the United States District Court, Northern District of Ohio. On October 19, 1994, the defendants all jointly moved for summary judgment. (App. E.) In making this motion before the trial court, the defendants did not dispute that VENTURA was disabled as defined under the ADA. To the contrary, the defendants maintained in their summary judgment motion that VENTURA was indisputably so disabled that they could not reasonably accommodate him without undue hardship. (App. E-1 to E-6.)

While the defendants asserted that reasonable minds were compelled to conclude that VENTURA

was too disabled, the district court held that reasonable minds were compelled to conclude that VENTURA was not disabled at all. (App. B-15, B-16.) Consequently, the district court granted the defendants' motion, but for reasons totally contrary to those raised by defendants. The district court held that VENTURA's asthma did not substantially limit his major life activities of working or breathing because he continued to exercise, play a musical instrument and engage in other physical activities. (App. B-15 to B-20.) The district court failed to consider or address the fact that VENTURA's ability to engage in other activities was the result of his taking medication to control his asthma.

C. Court of Appeals

VENTURA appealed the decision of the district court to the Sixth Circuit Court of Appeals. As part of that appeal, VENTURA raised the procedural error of the district court granting summary judgment on an issue never raised by the movant. (App. D-27 to D-29.) VENTURA further noted the logical inconsistency of the defendants' and district court's positions, which is particularly troubling on summary judgment. (App. D-29.)

Nonetheless, on March 4, 1997, the Sixth Circuit affirmed the district court's decision, finding that VENTURA was not disabled as defined under the ADA because he is able to engage in different activities. (App. A-6, A-7.) The Court of Appeals did not even address the procedural problem of granting summary judgment on an issue not raised by the movant. The Sixth Circuit also failed to consider the extent to which VENTURA's ability to engage in other activities was made possible by his taking proper medication to control his asthma.

VENTURA timely filed a Petition for Rehearing En Banc. On April 18, 1997 this petition for rehearing was denied. (App. C.)

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate in this case under Sup. Ct. Rule 10.1(a) and 10.1(c). The Sixth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. In particular, the Sixth Circuit has decided as a matter of law that an individual who attempts to engage in some normal activities, even with the use of assistance such as medication, cannot be protected as disabled under the ADA. This decision conflicts with the intent of Congress to establish clear, consistent and enforceable

standards to eliminate discrimination against individuals with disabilities. The Sixth Circuit's decision also conflicts with other courts of appeals which have recognized the validity of EEOC interpretive guidelines which indicate that whether an impairment substantially limits a major life activity should be assessed without considering mitigating measures such as medication. *See,* 29 C.F.R. App. § 1630.2(j) (App. L hereto). Also, the court, in affirming summary judgment on an issue never raised or argued by the movant, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Court of Appeals' Decision Conflicts with the Intent of Congress and the Purpose of the ADA.

In 1990, Congress enacted the Americans with Disabilities Act ("ADA") to expand the protection under the federal law for persons with disabilities. Among the reasons the ADA was enacted are that:

> (1) some 43,000,00 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> ...
>
> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;
>
> ...

42 U.S.C. § 12101(a)

As the Eighth Circuit has noted:

> The purpose of the ADA is broad and remedial: it is de-

> signed to provide 'a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'

Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996); *quoting in part* 42 U.S.C. § 12101(b)(1).

Congress also stated as its purpose in enacting the ADA:

> - to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> - to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
>
> - to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the

> major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(2)-(4) (emphasis added).

As the Third Circuit has noted, the ADA was enacted to remedy the shortcomings of § 504 of the Rehabilitation Act (29 U.S.C. § 794) including "the limited extent of its coverage, inadequate enforcement mechanisms and erratic judicial interpretations." *Helen L. v. DiDario,* 46 F.3d 325, 331 (3rd Cir. 1995), *citing,* Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute,* 26 Harv. C.R.-C.L. L. Rev. 413, 431 (1991).

The ADA is not being enforced in a clear and consistent manner, which is defeating the congressional purpose of providing a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Indeed, the Wall Street Journal has reported that employers prevail in about ninety percent (90%) of the lawsuits filed under the ADA because of the "Catch-22" often faced by workers in showing that they are capable of performing their jobs but that their disabilities substantially affect them. *Wall Street Journal,*

February 18, 1997 at 1, col. 5 (attached hereto at App. M-1).

This case graphically illustrates the "Catch-22" which is defeating the purpose of the ADA. While the defendants moved for summary judgment claiming that VENTURA was too disabled to be accommodated without undue hardship, the district court and the Sixth Circuit found that VENTURA was not disabled at all because he could still engage in some other normal activities. (App. A-6, A-7, B-15 to B-20, E-1 to E-6.)

There are two opposite parameters established by Congress for a person to be entitled to protection under the ADA. First, the individual must meet the threshold of being disabled. 42 U.S.C. § 12102. The disability, however, cannot be so limiting as to preclude reasonable accommodation without undue hardship. 42 U.S.C. § 12111(8) to (10). In this case, those parameters have been narrowed so much that they literally overlap, eliminating any area in between in which an employee could be considered qualified and disabled.

What is particularly disturbing is that these issues were determined on summary judgment rather than at trial. While a finder of fact might ultimately decide that an individual is either too disabled or not disabled at all, on summary judgment the employee

need only arguably fall within the protected classification. Thus, on summary judgment the parameters ought actually be broader. Unless the plaintiff is indisputably not disabled or indisputably unable to be reasonably accommodated, summary judgment on these issues are inappropriate. The irreconcilable contradiction between the defendants and the courts below reflects the need for this Court to clarify and delineate the proper parameters so that the ADA provides "clear, strong, enforceable standards" as Congress intended. 42 U.S.C. § 12101(b)(2).

The Sixth Circuit, in this case, inappropriately narrowed the parameters of what is considered a disability under the ADA by holding that VENTURA's efforts to live as full a life as possible (considering his condition), including limited exercise and playing a musical instrument, precluded him, as a matter of law, from being considered disabled. (App. A-6, A-7.) This is certainly inconsistent with the purpose and intent of the ADA "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8); *see, also, Helen L.*, 46 F.3d at 332-33. From a policy standpoint, a disabled individual would be well advised, based on the Sixth Circuit's decision in this case, to crawl into a hole and avoid engaging in any activity which might

be used to question his or her disability. This works directly against the purpose of the ADA to encourage full participation and independent living for disabled individuals.

There is a divergence of opinion among various courts on this issue. Some courts, along with the Sixth Circuit in this case, have viewed involvement in certain activities as preclusive of an individual being considered disabled. *See, Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 723-24 (2nd Cir. 1994)[1]; *Gaddy by and through Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan. 1997). Other courts, however, have realized that a person need not be totally debilitated and have recognized the existence of a disability for individuals still able to engage in some activities. *See, e.g., Milton v. Bob Maddox Chrysler, Plymouth, Inc.*, 868 F.Supp. 320, 324-25 (S.D.Ga. 1994).

The Sixth Circuit, in this case, recognized that "The determination of whether a particular impairment constitutes a disability must be made on a case-by-case

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[1] Interestingly, the Second Circuit in *Staron v. McDonald's Corp.*, 52 F.3d 353, 355 (2nd Cir. 1995), recognized the purpose of the ADA to establish 'clear, strong, consistent, enforceable standards' in allowing a suit to proceed seeking to require the defendants to eliminate smoking in their restaurants to accommodate allergies and sensitivity to cigarette smoke.

basis." (App. A-5.) Indeed, there are numerous factual considerations which must be made to determine whether a particular individual is disabled. *See, e.g., 29 C.F.R. § 1630.2(g), (h), (i) and (j); 29 C.F.R. App. § 1630.2(j).* Thus, the determination of whether a particular individual is disabled is essentially a factual questions which is not generally appropriately determined by the Court on summary judgment.

The Sixth Circuit correctly notes that "Blanket determinations that a particular condition is not a disability should be avoided." (App. A-5.) The Court, however, made just such a blanket determination that VENTURA's efforts to live as active a life as possible precluded him from the protection of the ADA as a matter of law.

If the congressional purpose of providing "clear, strong, consistent and enforceable standards" under the ADA is to be fulfilled, this Court needs to clarify that involvement in other activities will not preclude protection under the ADA as a matter of law, but that the issue is a factual one for trial.

This case is particularly appropriate for this Court to address this issue. The record demonstrates VENTURA's asthmatic condition and the limitations it imposed on him. The record also demonstrates that VENTURA, with the use of medication, was still able

to perform a number of jobs with the CITY and has been able to engage in several other activities, even if on a more limited basis.

Indeed, VENTURA is precisely the type of individual the ADA was intended to benefit. While certainly not debilitating, his asthma caused substantial limitations which required some reasonable accommodation to allow him to work and live a full life.

Judicial activism is no more appropriate when it fails to enforce rights and remedies which have been enacted by Congress than when it creates such rights or remedies on its own. Congress has established the ADA as a broad remedy for those affected with various disabilities. This Court needs to consider this case so that the ADA will be properly and consistently enforced as intended by Congress.

B. The Decision Below Conflicts with Decisions in Other Circuits.

The Equal Employment Opportunity Commission ("EEOC") has promulgated interpretive guidelines for Title I of the ADA. 29 C.F.R. App. § 1630. Among those guidelines, it is stated:

> The determination of whether an individual is substantially limited in a major life

> must be made on a case by case basis, without regard to mitigating measures such as medicines, assistive or prosthetic devices.

29 C.F.R. App. § 1630.2(j) (emphasis added).

The validity of this guideline has been expressly recognized by at least two circuits. In *Harris v. H & W Contracting Company,* 102 F.3d 516, 520-21 (11th Cir. 1996), the Court found that the interpretive guidance was based on a permissible construction of the ADA and was supported by the statute's legislative history. *See, also, Roth v. Lutheran Gen. Hospital,* 57 F.3d 1446, 1454 (7th Cir. 1995). As stated in the legislative reports:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy

> or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), 101st Cong.2d Sess. at 52 (1990), 1990 U.S. Code Cong. & Admin. News at 334; *see, also,* H.R. Rep. No. 101-485(III), 101st Cong.2d Sess. at 28-29 (1990), 1990 U.S. Code Cong. & Admin. News at 451; S. Rep. No. 116, 101st Cong. 1st Sess. at 23 (1989).

The Eleventh Circuit in *Harris* relied on this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) in recognizing that the agency's interpretation of the statute it is entrusted to administer is given "considerable weight" and is not to be disturbed unless it appears from the statute or legislative history that Congress intended otherwise.[2] Consequently, in *Harris*, 102 F.3d at 522-23, the Court followed the interpretive guidance of 29 C.F.R. App. § 1630.2(j) in

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[2] Similarly, in *Helen L.*, 46 F.3d at 329-33, the Third Circuit analyzed the history and purpose of the ADA in depth in recognizing the validity of the regulations under the standards of *Chevron*.

considering whether the plaintiff was substantially limited in a major life activity without regard to mitigating measures.

In this case, the Sixth Circuit summarily dismissed VENTURA from protection under the ADA because he was able to engage to a limited extent in some normal activities. (App. A-5, A-6.) The Sixth Circuit, however, failed to follow the interpretive guidance of 29 C.F.R. App. § 1630.2(j) by failing to consider that VENTURA's ability to engage in these activities is the result of his taking certain medications to control his asthma. (App. F.)

The Sixth Circuit is not alone in this regard. Other courts have refused to follow the interpretive guidance of 29 C.F.R. App. § 1630.2(j) even though it is expressly supported by the legislative history. *See, e.g., Gaddy by and through Gaddy,* 953 F.Supp. at 337. Other courts have recognized the validity of the interpretive guidelines, as did the Eleventh Circuit in *Harris,* in assessing whether the individual is substantially limited in a major life activity without considering mitigating factors. *See, e.g., Sicard v. City of Sioux City,* 950 F.Supp. 1420, 1430-39 (N.D. Iowa 1996).

The extent to which an individual may be considered substantially limited in a major life activity will certainly depend in large part on whether or not

mitigating measures such as medicines, assistive or prosthetic devices are considered. The Sixth Circuit's finding in this case that VENTURA is not disabled because of his engagement in other activities failed to consider the fact that this was made possible through the use of medication. Thus, the Sixth Circuit's decision cannot be reconciled with the interpretive guidelines of 29 C.F.R. App. § 1630.2(j) or the case law upholding it. If the ADA's purpose of providing clear, strong, consistent and enforceable standards is to be realized, it is imperative that this Court resolve this issue.

C. The Court of Appeals and District Court Departed from the Accepted and Usual Course of Judicial Proceedings so as to Call for Exercise of this Court's Power of Supervision.

The district court granted summary judgment finding that VENTURA was not sufficiently disabled to be entitled to protection under the ADA. (App. B-15 to B-20.) The defendants, however, argued in the Motion for Summary Judgment that VENTURA's disability was so severe that he could not even perform the essential functions of his job and that his condition

could not be reasonably accommodated without undue hardship. (App. E1-E6.)

This Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986) is often cited for the principal that a non-moving party must produce evidence showing a genuine dispute on issues which that party bears the burden of proof at trial. What is ignored, however, at least in this case, is that *Celotex* confirms that this burden on the non-moving party arises only after the moving party has at least made a "showing" of an absence of a genuine issue concerning any material fact. *Celotex,* 477 U.S. at 325-26; *see, also, Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159 (1970).

In *Celotex*, 477 U.S. at 323, this Court established that it is not necessary for the moving party to support its motion "with affidavits or other similar materials negating an opponent's claim." This Court, nonetheless, maintained that:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

In this case, unlike in *Celotex,* the defendants made no "showing" whatsoever of a lack of a genuine issue concerning VENTURA's disability. At no time in their motion did they suggest that VENTURA was not at least disputably disabled. (*See,* App. E hereto.) As the defendants made no showing whatsoever on this issue, VENTURA had no burden to come forward with evidence.

As this Court has noted, summary judgment may be rendered sua sponte only if the party is put on adequate notice by the Court to come forward with evidence on an issue. *Celotex,* 477 U.S. at 326; *Fountain v. Filson,* 336 U.S. 681, 682-83 (1949). If the courts below believed there was an issue making this case prone for summary judgment which had not been raised by the defendants, the proper procedure would have been to notify the parties and order briefing on the issue. Without this notice and an opportunity to brief the issue and to submit affidavits at the trial court level, it was inappropriate for summary judgment

to be entered on an issue never raised or argued by the moving party.

This failure to follow proper procedure was specifically raised and argued to the Sixth Circuit on appeal. (App. D-27 to D-29.) The Sixth Circuit, however, never even addressed this procedural problem in affirming the district court's decision on the same issue of disability.

The ramifications of this failure to follow proper procedure is significant. A party may move for summary judgment on one particular issue, such as damages or proximate cause, for example. Based on the procedure followed by the courts below in this case, the non-moving party would be required to support its entire case even though other issues are uncontested by the moving party on summary judgment.

As presented in his brief to the Sixth Circuit (App. D) and previously in this brief, VENTURA maintains that there is adequate evidence in the record to establish at least a genuine issue for trial regarding his disability. That, however, does not negate the prejudice to the plaintiff in being unable to further support the record at the trial court level with affidavits or other appropriate materials in response to a properly

plead motion or notice from the court that the issue was being considered.

Entering summary judgment on an issue never raised or argued by the moving party, without providing notice that the issue was being considered, departs from the usual course of judicial proceedings and conflicts this Court's decisions in *Celotex* and *Adickes*. Consequently, it is imperative that this Court address the issue in the exercise of its power of supervision.

CONCLUSION

For the reasons set forth herein, the Court's standards for granting certiorari, as set forth in Sup. Ct. Rule 10.1, are well met in this case. Consequently, the petitioner respectfully submits that the petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 95-3582
Decided March 4, 1997

Pages A-1 thru A-13

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nº. 95-3582

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN VENTURA

Plaintiff-Appellant,

v.

CITY OF INDEPENDENCE, WALTER ELLERT, DOROTHY ORNAS, DENNIS MESSINA AND GEORGE SPILKER,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed March 4, 1997

Before: **MERRITT** and **COLE**; Circuit Judge;
ECHOLS, District Judge.[1]

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[1]The Honorable Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

PER CURIAM. Plaintiff John Ventura appeals the district court's grant of summary judgment in favor of the defendants in his employment, discrimination suit under Title I of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12111-12117. Ventura alleges that his asthma constitutes a disability under the ADA and argues that his former employer, the City of Independence, Ohio, and several city officials (collectively, the "City") discriminated against him on the basis of that disability by reclassifying him, reducing his pay, and failing to accommodate his physical restrictions. Ventura also claims that the City breached its collective bargaining agreement with the American Federation of State, County and Municipal Employees, and retaliated against him in violation of 42 U.S.C. § 12203 of the ADA for filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Finally, Ventura alleges under state law that the City intentionally caused him emotional distress. For the following reasons, we AFFIRM the district court's grant of summary judgment.

I.

This court reviews a district court's grant of summary judgment *de nova*, using the same standard employed by the district court. *City Mgmt. Corp. v United States Chem. Co. Inc.*, 43 F.3d 244, 250 (6th Cir. 1994); *Kraus v. Nobel Corrugated Containers Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *see Moore v. Phillip Morris Cos.*, 8 F.3d 335, 339 (6th Cir. 1993). Summary judgment is appropriate where

"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Alec. Ind. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II.

Ventura first contends that the district court erred in concluding that his asthma does not constitute a disability within the coverage of the ADA. Ventura presented evidence to the district court that his asthma causes him difficulty in breathing and prevents him from working around diesel fumes, in high humidity or in extreme temperatures. He also notes that his asthma restricts his ability to work irregular hours, such as the night shift. Ventura argues that he presented sufficient evidence to the district court to establish that his asthma significantly impairs his ability to work and breathe and, thus, that he is "disabled" within the meaning of the ADA.

The ADA mandates that an employer shall not discriminate against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. In order to assert a claim of discrimination under the ADA, a plaintiff must satisfy the threshold requirement of demonstrating that he or she is disabled under the statute. *See Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248 (6th Cir. 1985) (construing the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96, the model for the ADA).[2] Many physical or

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[2]When Congress drafted the ADA, it intended that the case law developed under the Rehabilitation Act would serve as a guide to interpreting the ADA's provisions. *See e.g.* H.R. Rep. No. 485. 101st Cong., 2d Sess., pt. 3, at 41, 42 (stating that the flexible approach used under the Rehabilitation Act for determining undue hardship is appropriate for the ADA as well and noting that, "[l]ike the Rehabilitation Act the burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship") (citing *Nelson v Thornburgh,* 567 F. Supp. 369 (E.D. Pa. 1983) as an example of the Rehabilitation Act case law serving as a guide to ADA courts in utilizing a flexible approach to determining undue hardship).

Thus, Congress has specifically directed that courts impose similar standards under the Rehabilitation Act and the ADA to prevent inconsistent or conflicting requirements. *See* 29 U.S.C. § 794(d) (stating that the standards used to determine whether there has been a violation of this section shall be the same as those applied under Title I of the ADA); 42 U.S.C. § 12117 (b) (directing that the agencies

mental impairments "do not impact an individual's life to the degree that they constitute disabling impairments." 29 C.F.R. pt.1 630, App. § 1630.2(j). Rather, a physical or mental impairment "rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities." *Id; see* 42 U.S.C. § 12102(2)(A) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual ...."). "'Major life activities' are those basic activities that 'the average person in the general population can perform with little or no difficulty . . . [such as] caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" 29 C.F.R. pt. 1630, App. § 1630.2(i). The determination of whether a particular impairment constitutes a disability must be made on a case-by-case basis. Blanket determinations that a particular condition is not a disability should be avoided. *See* 29 C.F.R. pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is . . . based . . . on the effect of that impairment on the life of the individual.

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charged with enforcing the ADA and Rehabilitation Act shall coordinate their procedures so as to prevent the "imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973").

Some impairments may be disabling for particular individuals but not for others ....").

In the present case, Ventura has failed to demonstrate that his asthma substantially impairs his ability to breathe or work and, thus, has failed to demonstrate that he is disabled under the ADA. Ventura admitted at his deposition that, since he was diagnosed with asthma, he has engaged in a number of activities that belie his claim that his ability to breathe and work have been significantly restricted. For example, Ventura admitted that his asthma has not prevented him from playing baseball and football, performing calisthenics, walking, playing the saxophone, occasionally running, singing, and water skiing. There is also evidence that, although Ventura may be precluded from working as a Grade I maintenance employee for the City, he is able to engage in numerous other types of employment. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994) ("An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one.") (citing *Jasany* 755 F.2d at 1249 n.3.). Ventura admits that he has engaged in employment-related activities such as landscaping, painting, laying ceramic tile, constructing residential decks, plastering, pressure-washing buildings, and working as a late-night security officer. Considering that Ventura is able to perform a wide range of activities and hold several different types of jobs, we do not believe that his inability

to perform the duties of the Grade I maintenance position with the City renders him disabled within the meaning of the ADA. *See Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992) (holding that "an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally.")

Accordingly, Ventura has failed to offer sufficient evidence to demonstrate that his asthma has substantially impaired his ability to work or breathe or impacted any other major life activity. Thus, the district court did not err in concluding that Ventura was not disabled within the meaning of the ADA and granting the City summary judgment as to Ventura's discrimination claim.

IV.

Ventura next contends that the district court erred in concluding that he failed to establish a prima facie case of retaliation in violation of the ADA. *See* 42 U.S.A. § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter."). Specifically, Ventura alleges that the City "discharged" him as a part-time patrol officer because he had filed a charge of disability discrimination with the

EEOC.[3] Ventura notes that he had filed the EEOC charge eight months earlier concerning his demotion from a Grade I to a Grade III maintenance position in another City department. Ventura also notes that his "termination letter" was sent on the same day that an EEOC investigator conducted an on-site investigation of his disability discrimination charge.

To establish a prima facie case of retaliation, Ventura must show that (1) he was engaged in a protected activity; (2) the City knew of his exercise of this protected activity; (3) the City then took an adverse employment action; and (4) there was a causal connection between the protected activity and the City's actions. *See Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (citing *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987)). Once the plaintiff has established a prima facie case, "the burden shifts to the defendant 'to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'" *Manzer v. Diamond Shamrock*

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[3]Ventura received a letter from the Chief of Police, Anthony Appenzeller, in April 1993. The letter informed Ventura that, because he had not worked for more than a year as a part-time patrol officer, he was required to submit to retraining and return all equipment issued to him. The letter itself did not state whether Ventura's employment was terminated.

Chem. Co., 29 F.3d 1078, 1082 (6th Cir. 1994) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)); *see Jasany*, 755 F.2d at 1249-50 n.5 (applying the *McDonnell Douglas* analysis and burden- shifting analysis to handicap discrimination cases). The plaintiff must then produce direct, indirect, or circumstantial evidence that the employer's decision was a result of his or her disability. *See Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *see Manzer*, 29 F.3d at 1084.

Plainly put, Ventura failed to establish a prima facie case of retaliation trader the ADA. Although Ventura engaged in a protected activity when he filed a charge of disability discrimination with the EEOC, he has not established the remaining elements of the retaliation claim. First, Ventura has failed to produce any evidence that Chief Appenzeller was even aware that Ventura had filed an EEOC complaint. *Cf. Landefeld v. Marion General Hosp., Inc.*, 994 F.2d 1178 (6th Cir. 1993) (finding that plaintiffs failure to prove that the board of directors had knowledge of the plaintiffs disability prevented the plaintiff from recovering for discrmininatory discharge under the Rehabilitation Act). Moreover, as the district court noted, the mere fact that Chief Appenzeller's letter was sent on the same day that an EEOC investigator conducted an on-site investi-

gation at the City garage[4] is insufficient to support an inference of discrimination. Although the timing of events is relevant in determining whether a plaintiff has put forth a prima facie case of retaliation, *see Canitia,* 903 F.9d at 1066, evidence that certain events occurred in close proximity is insufficient, standing alone, to support such a claim.

Second, Ventura has failed to show that the City ever took adverse employment action against him. Chief Appenzeller's letter stated only that, according to the Ohio Peace Officers Training Council, Ventura was required to submit to retraining and turn in his equipment because he had not been active as a patrol officer for more than one year. Ventura has failed to provide any evidence that the letter constituted a termination letter and has not demonstrated any discriminatory enforcement of the rules of the Ohio Peace Officers Training Council. For example, Ventura produced no evidence that other patrol officers were inactive for more than one year were not required to undergo retraining or turn in their equipment.

Third, Ventura failed to show any causal connection

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[4]Ventura worked at the City garage in his maintenance position, not in his position as a par-time patrol officer. Thus, Chief Appenzeller would not have even known about the on-site investigation unless informed by others.

between his "discharge" from his part-time patrol officer position and his filing of an EEOC complaint. Because Ventura failed to produce any evidence that Chief Appenzeller was even aware of his EEOC complaint, Ventura cannot show that Appenzeller sent him the letter on that basis.

Fourth, even assuming that Ventura established a prima facie case of discrimination, his claim nevertheless fails as the City articulated a legitimate, non-discriminatory reason for its actions which Ventura failed to rebut. *See Manzer,* 29 F.3d at 1082. Specifically, the City notes that, under Ohio law, a peace officer must turn in his equipment if he has not worked in more than one year and fails to undergo required retraining. Not only has Ventura failed to rebut the City's assertion he readily admits that he failed to meet these requirements and, as such, was required by law to turn in his equipment. Thus, even if Ventura had established a prima facie case of discrimination, he has failed to rebut the City's articulated, nondiscriminatory reason for Chief Appenzeller's sending the letter.

V.

Ventura also contends that the district court erred by granting summary judgment in favor of the City on his claims under the City's collective bargaining agreement. Ventura argues that the City breached the agreement when it recategorized him from a Grade I to a Grade III

maintenance position and refused to accommodate his alleged disability.[5] Notably, Ventura does not contest the district court's finding that his claims under the collective bargaining agreement are "coextensive with his rights under the ADA."

Because we have concluded that Ventura is not disabled within the meaning of the ADA and because the district court found that Ventura's rights under the ADA and the agreement are coextensive, we conclude that the City did not breach the agreement when it recategorized Ventura from a Grade I to a Grade III maintenance position. Thus, the district court properly granted summary judgment in favor of the City on Ventura's claim for breach of contract.

VI.

Ventura finally contends that the district court erred in dismissing his state law claims. However, once a district court has dismissed all of a plaintiff's federal claims, that court may decline to exercise supplemental jurisdiction over any remaining state law claims. *See* 28 U.S.C. §1367(c)(3); *Landefeld,* 994 F.2d at 1182 (holding that, where the federal

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[5]Plaintiff asserts that the primary distinction between a Grade I employee and a Grade III employee is that the former is expected to supervise or lead a crew. The reclassification also resulted in a fifty-eight-per-hour reduction in pay.

claims are dismissed before trial, the state claims should be dismissed as well) (quoting *Taylor v. First of America Bank-Wayne* 973 F.2d 1284, 1287 (6th Cir. 1992)). Because the district court properly granted summary judgment on all of Ventura's federal claims, it did not err in declining to exercise supplemental jurisdiction over his remaining state claims and dismissing those claims without prejudice.

VII.

Accordingly, the district court's grant of summary judgment in favor of the defendants is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM AND ORDER

Civil Nº. 1:93-CV-2701
filed April 18, 1995

Pages B-1 thru B-26

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN A. VENTURA, *Plaintiff,*	)	
	)	Case No. 1:93CV2701
vs.	)	
	)	Memorandum and Order
CITY OF INDEPENDENCE, et al., *Defendants.*	)	

Plaintiff John A. Ventura brings this action in which he alleges that the City of Independence, Ohio; Walter Ellert; Dorothy Ornas; Dennis Messina and George Spilker (collectively the "City" or the "defendants) discriminated against him in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 through § 12213, ("ADA" or the "Act") when, instead of accommodating his known disability, they reclassified him and reduced his pay. Ventura also claims that the City breached its collective bargaining agreement with the American Federation of State, County, and Municipal Employees ("AFSCME"), and retaliated against him in violation of 42 U.S.C. § 12203 of the ADA for filing a charge with the Equal Employment Opportunity Commission ("EECC"). Ventura further alleges under state law that the defendants intentionally caused him emotional distress.

Defendants move this Court to grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Rules"). For the reasons discussed below, the Court grants summary judgment in favor of defendants as to Ventura's Claims 1, 2, and 3 and dismisses, without prejudice, Ventura's state law claims under Claims 4 and 5.

I.

The undisputed facts are as follows: Ventura was hired by the City on May 1, 1977 as a Grade III maintenance person in the City's Service Department. On December 18, 1977, Ventura was promoted to a Grade II maintenance position, and on December 5, 1982, he was promoted to a Grade I maintenance position. Ventura served as a Grade I maintenance person through October 1991.

Sometime during late 1991, Ventura developed an asthmatic condition. On November 30, 1991, Ventura submitted a note to defendant Ornas, the Service Director for the City, from Dr. Papsidero. According to the note, Papsidero recommended that Ventura not work the midnight shift or "irrigular" [sic] hours. The note did not explain why Dr. Papsidero requested the restriction, nor did the note describe any mental or physical impairment which would otherwise require a restriction. Ventura admitted that he never submitted any information concerning his medical condition to support Papsidero's requested restriction, and

refused to discuss his medical condition with Ornas. Ventura Dep. at 138-141. Nevertheless, even without supporting medical documentation, the City honored Ventura's request. Ventura was not required to perform any Grade I duties which would have required him to work during the hours mentioned in the requested restriction.

On December 16, 1991, Ventura presented Ornas with a restriction recontest from Dr. Weiner. According to Weiner's note, Ventura suffered from asthma which is exacerbated by diesel fumes. Weiner advised only that Ventura should be "excused from driving trucks if he has problems." Ornas Affidavit, Exh. 6. Accordingly, the city adjusted Ventura's work schedule and job duties; Ventura was not required to operate the garbage truck, work after midnight, or work near diesel vehicles. Instead, venture was assigned to operate gasoline-fueled vehicles, perform general laborer functions and work in the recycling program.

On January 24, 1992, at the behest of the city, Ventura was examined by Dr. Bray. In a March 13, 1992 letter to Ornas, Bray explained that Ventura "has asthma, which is made worse by diesel fumes." Bray cautioned that venture needed to avoid diesel fume irritants, but noted that

"[b]y definition, asthma is a reversible and temporary constriction of the airways." Ventura Exh. A-3.

During his deposition, Venture stated that, despite his asthmatic condition and the restrictions recommended by a number of physicians, he was able to pursue a wide range of activities. Ventura noted that during the period at issue he had worked as a part-time police officer for the city, as a part-time security officer during late evenings and early mornings at a local nightclub, and as a part-time landscaper. Ventura acknowledged that he paints and remodels houses and does construction work. Ventura stated during his deposition that he played a saxophone in a band which performed in bars, basements, and at parties. Ventura also said that he swims regularly, exercises, walks, does calisthenics, lifts weights, stretches and occasionally runs and waterskis.

On February 13, 1992, the city and AFSCME entered into an agreement to address Ventura's request to be excused from driving city garbage trucks. Ventura's reluctance to drive the truck was the result of an October 1991 incident in which a fellow employee was injured while riding a truck driven by Ventura. In his deposition, Ventura testified that he did not tell the city that he could not drive the garbage truck, but only "asked for some time" before resuming those activities. According to the Memorandum

of Understanding, Ventura agreed to submit to psychotherapy treatments through May 1, 1992, later extended through August 28, 1992, after which the city and AFSCME agreed to reevaluate Ventura's condition and job classification. The city continued to pay Ventura at the Grade I rate and did not require him to drive the garbage truck, work after midnight or work on diesel-powered vehicles.

Bray reexamined Ventura on July 29, 1992. In a July 30, 1992 letter to Ornas, who by that time had been replaced by defendant Ellert as the city's Service Director, Bray again noted that Ventura suffered from asthma. According to the letter, "there are certain reliable provokers of his symptoms, such as diesel fumes, cigarette/cigar smoke, high humidity, and vigorous exercise in cold weather." Bray stated in the letter that Ventura should be restricted in his exposure to diesel fumes and, while he could work irregular hours, he should not work during the "six hours or so after midnight." Bray also noted that Ventura has increased his exercise which has "specifically restored some sense of well-being and endurance. . . ." Ventura Ex. A-5.

On August 30, 1992, as provided in the Memorandum, Ellert, with the assistance of Ornas, reviewed the essential functions of the Grade I position and the

restrictions recontested by Ventura and his physicians. Ellert determined that Ventura could not perform the essential functions of the Grade I position, but could perform the essential functions of a Grade III position. Accordingly, Ellert reclassified Ventura as a Grade III maintenance person and assigned him concomitant Grade III duties. The city advised Ventura that if his job restrictions were removed, he would be considered for re-classification. Ellert Affidavit, ¶¶ 3-5.

On August 31, 1992, one day after being reclassified, Ventura was examined by Dr. Sauers. Sauers determined that Ventura is allergic to certain grasses, dust molds and animal hairs. Ventura did not report the results of Sauers' examination to defendants. Shortly thereafter Ventura filed a charge with the EEOC in which he alleged that the defendants discriminated against him on the basis of disability.

According to Ventura's amended complaint, on April 23, 1993, approximately eight months after Ventura filed the EEOC charge, the same day an EEOC investigator conducted an on-site investigation of Ventura's October 1, 1992 disability discrimination charge, Anthony Appenzeller, the Chief of Police, terminated Ventura from a part-time patrol officer position. Ventura alleges that this termination was in retaliation for his filing of the charge. Appenzeller's

April 28, 1993 letter to venture noted that Ventura had not worked for at least a year and that according to the Ohio Peace Officers Training Council, officers who have not worked for a year or more must submit to retraining. The letter also requested that Ventura return all equipment issued to him. Appenzeller's letter did not state whether ventura~s employment was being terminated.

On May 14, 1993, Ventura filed an additional charge with the EEOC in which he claimed that Appenzeller terminated his employment with the police department in retaliation for his earlier filed complaint against the city.

On June 21, 1993, Ventura had difficulty breathing while cleaning a storm sewer catch basin. Immediately after the incident, Ventura took sick leave and was examined by Dr. Sauers. During his examination, Ventura introduced the topic of seeking disability benefits and indicated that he intended to explore the possibility. Sauers Dep. at 74. Sauers gave Ventura a note which recommended that Ventura "take an extended leave from work due to his Bronchial Asthma and Chronic Fatigue Syndrome until further notice." Ventura, Ex. A-8. Eight days later, on June 29, 1993, Ventura filed a claim for permanent disability with the Public Employees Retirement System of Ohio (TAPERS"). Ventura never returned to work for the city.

According to his PERS disability benefits claim, Ventura was unable to work in diesel fumes, humidity, cold air, dust, smoke, asphalt vapors or during irregular hours. Sauers' report, attached to the disability application, provided that Ventura suffered from Bronchial Asthma, dust, mold and grass pollen allergy and chronic fatigue syndrome. Sauers did not indicate when Ventura could return to work and what restrictions, if any, would be necessary to permit Ventura to return to work. In Sauers' Affidavit he stated that "I recommended Mr. Ventura for disability due to the fact that the refusal by his employer to make these accommodations made it impossible for him to perform his job." Sauers Affidavit, ¶ 2. On February 22, 1994, PERS granted Ventura a full disability pension retroactive to August 1, 1993.

II.

Federal Rule of Civil Procedure 56 (c) governs summary judgment motions. Specifically, Rule 56 (c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c) ; Celotex Cord. v. Call, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 477 U.S. at 323.

The moving party must demonstrate through reference to pleadings and discovery responses the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. at 323. The burden on the nonmoving party is to show, through the use of evidentiary materials, the existence of a material fact which must be tried. Id. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 251-52. "The question on review of a summary judgment 'is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so on" sided that one party must prevail as a matter of law'". National Rifle Ass'n v. Handgun control Fed'n, 15 F.3d 559, 561 (6th Cir.)(quoting Anderson, 477 U.S. 242, 251-52 (1986)), cert. denied, 115 S.Ct. 71 (1994). The court's task is to engage in "the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any

genuine factual issues that properly can be resolved in favor of either party." Id. at 250.

In order to determine whether to grant a summary judgment motion, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); White v. Turfway Park Racing Ass'n. Inc., 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. In most civil cases, therefore, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

III.

A. Ventura's Disability Discrimination Claim

The ADA prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42

U.S.C. § 12112(a). Initially, Ventura must establish that (1) he has a disability; and (2) he is an otherwise qualified individual. See Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994).

Section 12102(2) of the ADA provides:

> The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more of the major life activities. . . .

Accordingly, in order to avoid summary judgment Ventura must produce specific facts to demonstrate that a genuine issue remains for trial as to whether he has an impairment and whether that impairment substantially limits a major life activity. Jasany, 755 F.2d 1244, 1249-50 (6th Cir.1985). See also Heilweil v. Mount Sinai Hosp., 32 F.3d 718 (2d Cir. 1994), cert. denied, 115 S. Ct . 1095 (1995); Dutton v. Johnson County Bd. of County Comm'r , 859 F. Supp. 498, 504-05 (D. Kansas 1994).

While the ADA does not define the terms "impairment," "substantially limits," or "major life

activities," EEOC regulations implementing Title I of the ADA are instructive.[1] See School Bd. of Nassau County v. Airline, 480 U.S. 273, 107 S.Ct. 1123 (1987). The ADA regulations at 29 C.F.R. § 1630.2(h)(1) define a physical impairment as a "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . .respiratory. . ."[2] Ventura has produced ample evidence that he has an asthmatic condition which obviously affects his respiratory system.

The mere fact that an individual has an asthmatic condition is insufficient to support an inference that the individual is disabled under the ADA. In order for Ventura to be protected by the ADA, his asthmatic condition must substantially limit a major life activity. Although the ADA does not define Major life activities," the ADA regulations provide that "major life activities" include "functions such as caring for oneself, performing manual tasks, walking,

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[1]This case involves allegations of disability discrimination by a public entity under Title II which incorporates by reference the employment definitions of Title I. 28 C.F.R. § 35.140.

[2]The ADA regulations adopt the definition of Major life activities" found in the regulations to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96.

seeing, hearing, speaking, breathing and working." 29 C.F.R. § 1630.2(i).[1] Ventura must offer some evidence, therefore, to establish that there is a genuine issue of material fact as to whether he is substantially limited in either the major life activity of breathing or working.

The ADA regulations provide six factors to consider in determining whether a condition substantially impairs a major life function. The first three factors which "should be considered" are:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

In order to determine whether an individual is limited in the major life activity of working, the regulations suggest three additional factors for consideration, including:

> (A) The geographical area to which the individual has reasonable access;
> (B) The job from which the individual has been disqualified because of an impairment, and the

number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3)(ii). Courts agree that in order to determine whether an individual is substantially impaired in the major life function of working it is appropriate to consider the individual's ability to perform other duties in the work place, as well as his or her ability to engage in other activities, including exercise, recreation and other work or employment. See. e.g., Jasany v. United States Postal Serv., 755 F.2d 1244, 1249-50 (6th Cir. 1985).

Generally, the exclusion from one position does not substantially limit a major life activity. See. e.a., Fugua v. Unisys Corp., 716 F. Supp. 1201, 1205-06 (D. Minn. 1989). "An impairment that affects only a narrow range of jobs can be regarded as not reaching a major life activity or as not

substantially limiting one." Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.3 (6th Cir. 1985). Under the ADA, "an individual is not substantially limited in working simply because he or she is unable to perform s particular job for one employer. . ." 29 C.F.R. Part 1630, Appendix 1630.2(j). See also Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992)("While the regulations define a major life activity to include working, this does not necessarily mean working at the job of one's choice"); Forisi v. Bowed, 794 F.2d 931, 935 (4th Cir. 1986) (substantial limitation on person's ability to work occurs when impairment forecloses generally "the type of employment involved"). Generally, for a physical condition to constitute a disability it must place an "individual so far outside the norm as to make it impossible or unusually difficult. . . to perform work that could be done by most other people." Cook v. State of R. I. Dept of Mental health Retardation & Hosp., 783 F. Supp. 1569, 1574 (D.R.I. 1992), aff'd, 10 F.3d 17 (1st Cir. 1993).

Although asthma is a potentially disabling condition, Ventura has failed to offer sufficient probative evidence here to establish that there is a genuine issue whether his asthma condition at the time of his reclassification or at any other time substantially limited him in either his ability to breathe or his ability to work. During his deposition, Ventura stated that he exercised regularly and engaged in

physical labor, including construction work, landscaping, remodeling and painting". Ventura confirmed that he played a wind instrument in a band which performed in environments containing known irritants to his condition. Ventura also acknowledged that in spite of the restriction advised by every physician who examined him he was able to work during the very early morning hours as a security guard/bouncer and that the effects of his condition abated according to the amount of exercise he got. Ventura has indicated that during the time at issue he worked as a police officer, security guard, musician and general laborer. Ventura also claims that he is able to work as a carpenter and is able to perform almost every function of a Grade III maintenance employee, if provided the appropriate work environment. Ventura has not offered any evidence concerning the kinds of jobs from which he is disabled, the geographic job market to which he had reasonable access, any evidence of general employment demographics, recognized occupational categories or any other information which would otherwise indicate the approximate number of jobs from which Ventura is excluded because of his asthma. See 29 C.F.R. 1630.2(i), (j)(2).

In fact, Ventura has provided substantial evidence that he was not disabled within the meaning of Section

12102(2) of the ADA at the time he was recategorized.[3] Sauers' sworn affidavit that he "recommended Mr. Ventura for disability due to the fact that the refusal by his employer to make these accommodations made it impossible for him to perform his job," undermines any inference of disability under the ADA and presupposes that employers must provide every requested consideration regardless of whether the employee has a disability. Not only is it not clear whether Sauers had any reliable information upon which to state that the city refused to accommodate Ventura, but also the city does not have any duty to accommodate an individual who is not disabled. Ventura's assertion that, among other considerations, the city should have invested $20,000 in a new ventilation system and allowed him to work only with non-diesel powered vehicles assumes that the city has a duty to accommodate him. Absent a claim that the employer regarded an individual as disabled, an individual is not "disabled" or substantially impaired in the

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[3]The fact that PERS determined that Ventura was disabled for purposes of receiving benefits is insufficient evidence, standing alone, to support an inference that Ventura was an individual with a disability under the ADA when he was recategorized in 1992. There is no evidence in the record to establish the meaning of "disability" under PERS, the bases, if any, for PERS' determination, or how Ventura's condition in 1992 is implicated by the PERS' decision, retroactive to August 1993.

major life function of working merely because he or she is unable to work in a particular environment because of the peculiar nature of his or her conditions.[4] See Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 723-24 (2nd Cir. 1994) ("Because [plaintiff's] asthmatic condition did not substantially limit a major life activity--either her ability to breathe or work--defendant's motion for summary judgment was properly granted."), cert. denied, 115 S.Ct. 1095 (1995); Byrne v. Board of Education, 979 F.2d 560, 565-66 (7th Cir. 1992) (allergy to common fungus and airborne organisms is not disability; plaintiff was not totally disabled because airborne pollutant situation could be remedied); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992), cert. denied, 113 S.Ct. 1255 (1993)(plaintiff was not disabled because sensitivity to chemicals prevented her from working only in lab and did not substantially limit employment opportunities as a whole); Miller v. AT & T Network Systems, 722 F. Supp. 633 (D. Or. 1989), aff'd,

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[4]Ventura does not allege that the city perceived him to be disabled. Moreover, the fact that the city provided requested restrictions does not require a determination that it perceived that Ventura Was disabled. "[A]n employer's decision to attempt to accommodate an employee who defines herself as impaired does not dictate a finding that the employer regards the employee as handicapped as a matter of law." See Byrne v. Board of Educ., 979 P.2d 560, 566-67 (7th Cir. 1992).

915 F.2d 1401 (9th Cir. 1990)(asthma of installer unable to work in extreme temperatures not substantial limitation under state discrimination laws); Daley v. Koch, 892 F.2d 212, 214-16 (2d Cir. 1939); Wright v. Tisch, 45 Fair Emp. Prac. Cas. (BNA) 151 (E.D.Va. 1987)(allergic reaction to dusty working conditions not handicap because plaintiff restricted only from unusual environmental conditions of her workplace); Fugua v. Unisys Corp., 716 F. Supp. 1201, 1206 (D. Minn. 1989). The mere fact that Ventura was unable to return to his particular job without some accommodation does not demonstrate a substantial limitation in the major life activity of working or breathing. See. e.g., Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 115 S.Ct. 1104 (1995); 29 C.F.R. § 1630.2(j)(3)(i).

Although this Court is quite aware of the protections afforded to individuals with disabilities, it would pervert the appropriate purpose of the ADA to interpret it to apply to individuals with not uncommon conditions. Accordingly, because Ventura has not produced sufficient evidence to establish a genuine issue that he has a disability under the ADA, the Court grants defendants' motion for summary judgment. The Court does not determine whether Ventura has produced sufficient evidence to establish that he is qualified" under the ADA, or whether the defendants would otherwise be entitled to the entry of an order granting

summery judgment as to his disability claim.

B. Ventura's Retaliation Claim

Section 12203(a) of the ADA provides:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

In order to establish a prima facie claim of retaliation, Ventura must prove that: (1) he engaged in a protected activity; (2) Appenzeller knew of the activity; (3) he was subjected to an adverse employment action; and (4) a causal link existed between the protected activity and the adverse action. Canitia v. Yellow Freight Sys. Inc., 903 F.2d 1064, 1066 (6th Cir.), cert. denied, 498 U.S. 984 (1990).

It is not disputed that Ventura satisfies the first prong of his prima facie burden. Ventura engaged in a protected activity when he filed his charge of disability discrimination with the EEOC.

The Court determines, however, that Ventura has not offered sufficient probative evidence to satisfy prongs two, three or four of his prima facie burden. The mere fact that the letter from Appenzeller was sent on the same day that an EEOC investigator allegedly conducted an on-site investigation at the city's garage is insufficient to support an inference that Appenzeller knew of Ventura's claim or that there is a causal link between the alleged adverse employment action and the protected activity. The city offered evidence that Appenzeller did not know of Ventura's protected activity. In this context, simultaneity does not suggest cause. Moreover, absent some evidence that the city ordinarily did not require patrol officers to return equipment or submit to retraining, or that the policy only applied to Ventura, a request to return equipment made pursuant to Ohio law does not constitute an adverse employment action for purposes of a retaliation suit under the ADA. Accordingly, this Court grants the city's motion for summary judgment as to Ventura's retaliation claim.

C. Breach of Collective Bargaining Agreement

In Claim 2 of his amended complaint, Ventura alleges that the City breached the collective bargaining agreement (the "agreement") when it recategorized him from a Grade I to a Grade III maintenance position and refused to accommodate his claimed disability. Ventura

claims that the city's decision to recategorize him breached Article 6 § 1 b) and Articles 22, 33 and 42 of the agreement. In its motion for summary judgment, the city acknowledges that it agreed not to raise certain defenses as to Ventura's claims under Articles 6 and 42, but claims that Ventura has failed to exhaust the grievance procedure as to the city's alleged breach of Articles 22 and 33 and, therefore, this Court has no jurisdiction to hear Ventura's claims arising thereunder. Ventura claims that the city stipulated that it would not assert a failure to exhaust grievance procedure defense to Claims 1 and 2 of his amended complaint which specifically include an allegation that the city breached Articles 22 and 33.

The Court agrees that Ventura has established that the city waived any failure to exhaust administrative process defense to Ventura's Claims 1 and 2. On June 9, 1994, the City and Ventura stipulated:

> [T]he Defendants hereby waive the defense of failure to exhaust the administrative process as to Claims 1 and 2 of the Amended Complaint. . . as a result of Plaintiff's withdraw] [sic] of Grievance No. 15187. . . . The parties have agreed that the subject matter of the grievance will be tried in this action rather than through the grievance process.

Claim 2 of Ventura's Amended Complaint plainly provides at ¶ 21:

> The CITY's demotion of VENTURA from Maintenance Classification I to Maintenance Classification II and its refusal to accommodate his medical condition was in violation of the contract governing Ventura's employment, including Article 6 § 1(b), Article 22, Article 33 and Article 42.

Accordingly, the City has waived its failure to exhaust administrative process defense as to its alleged breach of the agreement, including Articles 6, 22, 33 and 42.

Nevertheless, because Ventura's claims under the agreement are coextensive with his rights under the ADA, the city is entitled to summary judgment as to Ventura's Claim 2. Ventura acknowledges that Article 6 § l(b) of the agreement cedes virtual plenary authority to the city for the classification and categorization of maintenance employees. That authority is limited only by federal and state law as provided in Article 42 of the agreement. Article 33, which involves city employees' compensation schedule under the agreement, is only implicated when the city fails to comply with the ADA as incorporated by Article 42's limits on the city's rights under Article 6 § 1(b) of the agreement to

recategorize and reclassify employees.[5] Because this Court herein has determined that Ventura has not established a material issue of fact as to the city's alleged violation of the ADA when it recategorized Ventura, the Court also determines that summary judgment is appropriate as to Ventura's Claim 2.

D. Ventura's State Law Claims

The only issues remaining are Ventura's state law claims for intentional infliction of emotional distress. Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if the federal claims have been dismissed. Accordingly, this Court, in its discretion dismisses, without prejudice, Ventura's state law claims.

IV.

For the reasons stated herein, this Court grants the City's motion for summary judgment as to Ventura's Claims 1, 2, and 3, and dismisses, without prejudice, Ventura's state law claims under Claims 4 and 5.

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[5]Ventura has represented to the Court that he has abandoned any claims arising under Article 22 for purposes of this suit.

IT IS SO ORDERED.

/s/Ann Aldrich
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN A. VENTURA, *Plaintiff,*	)	
	)	Case No. 1:93-CV-2701
vs.	)	
	)	Order
CITY of INDEPENDENCE, et al., *Defendants.*	)	

ALDRICH, J.

The Court has filed its memorandum and order granting defendants' motion for summary judgment as to Claims 1, 2, and 3, and dismissing, without prejudice, Ventura's state law Claims 4 and 5. Therefore,

IT IS ORDERED that defendants; motion for summary judgment as to Claims 1, 2, and 3 is granted; Claims 4 and 5 are dismissed, without prejudice; final judgment is entered in favor of the defendant; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

/s/ Ann Aldrich
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case Nº. 95-3582
Filed April 18, 1997

Pages C-1 thru C-2

APPENDIX C

№ 95-3582

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN A. VENTURA, *Plaintiff-Appellant,*	)	
vs.	)	**ORDER**
CITY of INDEPENDENCE, et al., *Defendants.*	)	Filed April 18, 1997

BEFORE: MERRITT and COLE, Circuit Judges; and **ECHOLS*** District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon Robert L. Echols, United States District Judge for the Middle District of Tennessee, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXCERPTS OF BRIEF OF PLAINTIFF-APPELLANT

Sixth Circuit Case №. 95-3582
Filed August 9, 1995

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APPENDIX D

STATEMENT OF THE CASE

The plaintiff-appellant, JOHN VENTURA ("VENTURA") was hired by the CITY OF INDEPENDENCE ("CITY") Service Department as a Grade III maintenance person in May of 1977. (R.61: Ventura Depo., p. 16.)[1] He was promoted to Grade II in December, 1977 and then to Grade I in December 1982. (R.61: Ventura Depo., p. 16, 18.)

The main distinction between Grade III and a Grade I is that a Grade I employee is expected to supervise or lead a crew. (R.49: Ellert Depo., p. 29, 35, 36; R.50: Timinski Depo., p. 6; R.52: VonDriska Depo., p. 7-8; R.54: Kemenyes Depo., p. 28; R.55: Snabel Depo., p. 8.) As stated by the road foreman, Ed Timinski:

> A maintenance class one employee, usually their responsibilities consist of being like a crew leader...I guess, you know, someone that makes--can make a decision.

(R.50: Timinski Depo., p. 6.)

As road foreman, Timinski was frequently given direct supervision over VENTURA and was involved in

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[1]All deposition references cited and the Plaintiff's Brief in Opposition (R.99) have been designated by the Plaintiff for inclusion in the Joint Appendix.

work scheduling. (R.49: Ellert Depo., p. 5, 32, 33; R.50: Timinski Depo., p. 5.) He considered VENTURA to be a responsible and reliable employee. (R.50: Timinski Depo., p. 56.)

Except for the responsibilities of leading a crew, Grade III's are frequently asked to perform the same functions as Grade I employees. (R.49: Ellert Depo., p. 34-35; R.50: Timinski Depo., p. 8; R.52: VonDriska Depo., p. 8; R.54: Xemenyes Depo., p. 28-29; R.55: Snabel Depo., p. 7-8.) As stated by DENNIS MESSINA ("MESSINA"), the shop foreman for the Service Department:

> Q. Are Class III employees involved in operating vehicles with diesel engines?
> A. Yes.
> Q. Are they involved in snowplowing?
> A. Yes.
> Q. Okay. Are they involved in the recycling bin?
> A. Yes.

(R.57: Messina Depo., p. 27.)

The CITY's former Service Director, DOROTHY ORNAS ("ORNAS"), agreed that Class III employees may be required to drive snowplows, operate diesel powered vehicles or machines and work in extreme temperatures as well. (R.56: Ornas Depo., p. 45.)

Around 1980, the Service Department purchased a diesel truck which was designated as Truck #12. (R.61: Ventura Depo., p. 235-237.) The original equipment provided for an upright exhaust which exited above the cab. (R.62: Ventura Depo., p. 235.) Shortly after the truck was acquired, a dumpster was added to the back and the exhaust was modified to exit just below the cab on the passenger side. (R.61: Ventura Depo., p. 236.)

VENTURA was assigned to Truck #12 to plow snow for about twelve (12) years. (R.56: Ornas Depo., p. 52; R.61: Ventura Depo., p. 237.) Since about 1982, VENTURA complained about exhaust fumes entering the cab of Truck #12. (R.61: Ventura Depo., p. 236-237; R.62: Ventura Depo., p. 449; R.99: Brief in Opposition, Ventura Aff., ¶ 1, Exhibit "A" thereto.) VENTURA complained to DOROTHY ORNAS when she was the Department's administrative assistant and later when she was promoted to Service Director. (Id.; see, also, R.56: Ornas Depo., p. 57-58.)

VENTURA had noticed breathing problems while driving Truck #12 in March of 1991. (R.61: Ventura Depo., p. 119.) He was gasping for air and had to exit the truck because the fumes were so bad. (Id.) VENTURA promptly reported this to ORNAS when he returned to the garage. (Id. at 120.) Yet nothing was done to correct the problem with the truck's exhaust and VENTURA continued to be assigned to it until he was diagnosed with asthma in

December 1991. (R.61: Ventura Depo., p. 31, 40, 143; R.62: Ventura Depo., p. 461.)

For several years, since at least 1990, VENTURA also complained about exhaust fumes in the Service Department garage and the lack of adequate ventilation. (R.50: Timinski Depo., p. 20; R.52: VonDriska Depo., p. 13; R.53: Chuha Depo., p. 9; R.54: Kemenyes Depo., p. 10-13; R.57: Messina Depo., p. 56-57; R.61: Ventura Depo., p. 257-259; R.99: Brief in opposition, Ventura Aff., ¶ 2, Exhibit "A" thereto.) Several other employees complained about this problem along with VENTURA. (R.53: Chuha Depo., p. 9; R.54: Kemenyes Depo., p. 11-13.) Nothing was done to rectify the situation. (R.53: Chuha Depo., p. 9; R.55: Snabel Depo., p. 13; R.57: Messina Depo., p. 57-58; R.61: Ventura Depo., p. 258-259; R.99: Brief in opposition, Kapusta Aff., ¶ 2-3, Exhibit "B" attached thereto.)

In fact, the CITY abandoned efforts to complete a localized exhaust system with vents to draw off exhaust fumes throughout the garage. (R.52: VonDriska Depo., p. 11; R.61: Ventura Depo., p. 258-259; R.99: Brief in Opposition, Kapusta Aff., ¶ 2-3, Exhibit "B" thereto; R.99: Brief in Opposition, Wood Aff., ¶ 3, Exhibit "C" thereto.) If this system were completed, it would significantly improve the adequacy of the ventilation in the Service Department garage. (R.99: Brief in Opposition, Wood Aff., ¶ 3, 3, Exhibit "C" thereto.) The CITY, however, sealed

the vents and never completed this system. (R.52: VonDriska Depo., p. 11; R.99: Brief in Opposition, Ventura Aff., ¶ 2, Exhibit "A" thereto; R.g.9: Brief in Opposition, Kapusta Aff., ¶ 2-3, Exhibit "B" thereto; R.99: Brief in Opposition, Wood Aff., ¶ 3, Exhibit "C" thereto.)

On November 30, 1991, VENTURA submitted to ORNAS a note from his doctor restricting him from working hours after midnight or irregular hours. (R.61: Ventura Depo., p. 135-137; R.99: Brief in Opposition, Papsidero Note, Exhibit "A-1" thereto.) VENTURA was given this restriction by his doctor because he would wake up late at night with difficulty in breathing. (R.61: Ventura Depo., p. 136.) Despite the fact that VENTURA indicated the restriction was medically necessary, ORNAS was extremely irate. (R.61: Ventura Depo., p. 135-139.)

On December 12, 1991, VENTURA had a methacholine challenge test on his lungs which confirmed that he bad asthma. (R.61: Ventura Depo., p. 140) VENTURA'S doctor than restricted him from driving diesel trucks. (R.61: Ventura Depo., p. 143; R.99: Brief in opposition, Weiner Note, 12/16/91, Exhibit "A-2" thereto.)

MS. ORNAS was not satisfied with VENTURA's explanation or doctor's reports. So, on January 23, 1992, she informed him that she had scheduled appointments for him to see a specialist in occupational medicine, Dr. Bray. (R.56: Ornas Depo., p. 25-27; R.61: Ventura Depo., p. 155-157, 191.) Dr. Bray confirmed Dr. Weiner's diagnosis

of asthma and concurred with his recommendation that VENTURA should avoid exposure to diesel fumes. (R.99: Brief in Opposition, Bray letter, 03/13/92, Exhibit "A-3" thereto.)

On January 24th, after the examination by Dr. Bray, ORNAS told VENTURA he would be demoted if he couldn't do his job. (R.62: Ventura Depo., p. 481-482.) She indicated that he should get another job if this one was detrimental to his health. (Id.) VENTURA indicated to ORNAS that there were other jobs he could do and that other Grade I employees, namely Tom Mendezoff, weren't required to do numerous jobs under that classification. (R.61: Ventura Depo., p. 482.)

Mr. Mendezoff, a Grade I employee, has not had to plow snow or work irregular hours. (R.48: Mendezoff Depo., p. 5-9, 12-13; R.49: Ellert Depo., p. 69-72; R.50: Timinski Depo., p. 33-34, 4244; R.54: Kemenyes Depo., p. 30-31.) He has not had to operate the equipment that is claimed to be "essential" to the job classification. (R.48: Mendezoff Depo., p. 7-8; R.49: Ellert Depo., p. 1516, 36-37, 69-72, 92.) He doesn't even have a commercial drivers license, which is Supposed to be required of all Grade I employees. (R.49: Ellert Depo., p. 38, 70; R.54: Kemenyes Depo., p. 24.)

Dick Strozewski, even though a Grade I employee, was assigned to the Parks Department. (R.54: Kemenyes Depo., p. 32.) He didn't even work in the Service

Department and performed none of the functions normally associated with a Grade I employee. (R.56: Ornas Depo., p. 32.)

MS. ORNAS was well aware of VENTURA's talents and ability to perform other jobs. VENTURA had worked in the CITY'S Historic Hall periodically from about 1982 through about 1990. (R.50: Timinski Depo., p. 9; R.53: Chuha Depo., p. 17; R.55: Snabel Depo., p. 2526; R.62: Ventura Depo., p. 418; R.99: Brief in Opposition, Ventura Aff., 5 3, Exhibit "A" thereto.) He also worked on the renovation of the Town Hall in early 1992. (R.52: VonDriska Depo., p. 9; R.53: Chuha Depo., p. 17; R.99: Brief in Opposition, Ventura Aff., ¶ 3, Exhibit "A" thereto.) VENTURA's work included carpentry, painting, wall-papering, drywalling, plastering and various other remodelling and maintenance duties. (R.50: Timinski Depo., p. 9; R.53: Chuha Depo., p. 17; R.54: Kemenyes Depo., p. 19-20; R.55: Snabel Depo., p. 26; R.56: Ornas Depo., p. 12; R.62: Ventura Depo., p. 418; R.99: Brief in Opposition, Ventura Aff., ¶ 3, Exhibit "A" thereto.) Even MS. ORNAS was impressed with the quality of VENTURA's work. (R.53: Chuha Depo., p. 17; R.55: Snabel Depo., p. 26; R.56: Ornas Depo., p. 12.)

WALTER ELLERT ("ELLERT") succeeded MS. ORNAS as Service Director in June of 1992. (R.49: Ellert Depo., p. 4; R.56: Ornas Depo., p. 5, 32.) ORNAS has continued working with the CITY and assisted ELLERT

during the transition period. (R.49: Ellert Depo., p. 12-15; R.56: Ornas Depo., p. 23.) ELLERT was made aware of VENTURA's medical condition and the restrictions on his job duties. (Id.)

On July 29, 1992, the CITY had VENTURA examined by Dr. Bray a second time. (R.61: Ventura Depo., p. 199; R.99: Brief in opposition, Bray letter, 07/30/92, Exhibit "A-5" thereto.) Dr. Bray's second examination of VENTURA again confirmed his asthmatic condition. (R.99: Brief in Opposition, Bray letter, 07/30/92, Exhibit "A-5" thereto.) In addition to recommending that VENTURA not be exposed to diesel fumes or work in early morning hours, Dr. Bray indicated to the CITY in his letter of July 30th:

> For him [VENTURA], there are certain reliable provokers of his [asthma] symptoms, such as diesel fumes, cigarette smoke, high humidity, and vigorous exercise in cold weather.

(R.99: Brief in Opposition, Bray letter, 07/30/92, Exhibit "A-5" thereto, emphasis added.)

ELLERT specifically recalls receiving this letter. (R.49: Ellert Depo., p. 20.) VENTURA also specifically informed ELLERT that cold air aggravated his condition as well. (R.61: Ventura Depo., p. 3738.)

On August 14, 1992, VENTURA was informed by a Union representative that the CITY was planning to

demote him. (R.61: Ventura Depo., p. 205.) VENTURA received no notice of this from the CITY until ELLERT gave him a letter on September 3rd, demoting him to Grade III as of August 30, 1992. (R.49: Ellert Depo., p. 47; R.56: Ornas Depo., p. 45-46; Exhibit "A-6" thereto.) Both ORNAS and ELLERT admit to being involved in the decision to demote VENTURA. (Id.)

On September 8th, just after being demoted to Grade III, VENTURA was assigned to be in charge of a crew, even though leading a crew is what primarily distinguished a Grade I from a Grade III employee. (R.61: Ventura Depo., p. 220.) Thus, even after demoting him to Grade III, the CITY continued to assign VENTURA the responsibilities of a Grade I employee. (R.49: Ellert Depo., p. 29, 35-36; R.61: Ventura Depo., p. 220.)[2]

The abuse of VENTURA and the total disregard for his asthmatic condition (not to mention the health of other employees) continued to grow worse under Service Director ELLERT and shop foreman, DENNIS MESSINA. On October 6th, ELLERT and MESSINA had VENTURA clean the wash bay in the Service Department garage with unmarked, acidic chemicals with fumes that caused

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[2]On October 1, 1992, VENTURA filed his charge with the EEOC that his demotion was in violation of the American with Disabilities Act.

VENTURA extreme difficulty in breathing. (R.61: Ventura Depo., p. 228-229.)

After receiving the July 30th letter from Dr. Bray informing him that cold weather is a "reliable provoker" of VENTURA's asthma (in addition to VENTURA also informing him of this on several occasions) ELLERT assigned VENTURA on October 23rd to the back of the recycling trailer; an assignment which would continue throughout the winter. (R.61: Ventura Depo., p. 233-234; R.99: Brief in Opposition, Ventura Aff., ¶ 8, Exhibit "A" thereto, Exhibit "A-18" thereto.) VENTURA's road foreman, Ed Timinski, indicated on several occasions that he would like to have assigned VENTURA different jobs but that he was under orders from ELLERT and MESSINA to keep VENTURA on the recycling bin. (R.50: Timinski Depo., p. 49-50; R.62: Ventura Depo., p. 346, 446, 450.)

On February 12, 1993, VENTURA confronted ELLERT and MESSINA regarding their harassment and abusive tactics. (R.61: Ventura Depo., p. 263-265; R.62: Ventura Depo., p. 488-489.) He again reiterated Dr. Bray's report which indicated cold weather provoked his asthma. (R.61: Ventura Depo., p. 263-265; R.99: Brief in Opposition, Bray letter, 07/30/92, Exhibit "A-5" thereto.)

During this conversation, ELLERT stated to VENTURA:

- If you can't do this job because of your health, there's the door.

- Carbon monoxide never hurt anybody.[3]

- You're not paid to take medication on City time.

- If you need a break from the fumes inside the garage, stay outside where the air is fresh and clean.

(R.61: Ventura Depo., p. 263-265; R.62: Ventura Depo., p. 488-489.)

February 18, 1993 was one of the coldest days of the year. (R.99: Brief in Opposition, Certified Weather Record attached thereto as Exhibit "E".) It was so cold that a back-up vehicle was sent to allow the workers on the recycling crew to rotate and not have to be continually exposed to the cold; all the workers, except for JOHN VENTURA. (R.55: Snabel Depo., p. 16-23; R.61: Ventura Depo., p. 269-275.) Knowing that cold weather was a "reliable provoker" of VENTURA's asthma and with a totally vindictive and malicious disregard for a man's health, ELLERT ordered that all the workers on the recycling crew could rotate to warm up in the backup vehicle, except for VENTURA. (R.55: Snabel Depo., p. 16-18; R.61: Ventura Depo., p. 271.) The crew supervisor

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[3]MR. ELLERT has subsequently learned that the effect of carbon monoxide is lethal. TR.49: Ellert Depo., p. 97.)

even radioed to ELLERT, specifically requesting permission to allow VENTURA to rotate as well. (R.55: Snabel Depo., p. 17; R.61: Ventura Depo., p. 271.) ELLERT unequivocally denied this request. (Id.)

February 19, 1993 was another extremely cold day. (R.99: Brief in opposition, Certified Weather Record attached thereto as Exhibit "F".) After having VENTURA continually exposed to the cold the entire day before, without relief, ELLERT again assigned VENTURA to the back of the recycling trailer, although he did finally relent to at least allow VENTURA to rotate to the back-up truck with the other employees. (R.61: Ventura Depo., p. 277-278.) As a result of the exposure to the extreme cold on February 18th and 19th, VENTURA suffered from an upper respiratory infection and was out sick under doctor's orders for a week. (R.61: Ventura Depo., p. 279-282.)

Up until February 1992, VENTURA had also worked part-time for the CITY OF INDEPENDENCE Police Department. (R.61: Ventura.Depo., p. 298.) The Police Department knew that JOHN was not working as an officer until he recovered 100% from a prior assault and its resulting surgery. (R.61: Ventura Depo., p. 304-305.) On March 2, 1993, over one year after VENTURA had last worked as a police officer, Chief Appenzeller told VENTURA just to take care of himself and he would "get him back in the saddle again." (R.61: Ventura Depo., p. 299.)

On April 28, 1993, the EEOC began an on-site investigation, interviewing employees as a result of VENTURA's ADA charges. (R.61: Ventura Depo., p. 306.) The following day, VENTURA received a certified letter from Chief Appenzeller, dated April 28th. (R.61: Ventura Depo., p. 306.) The letter instructed VENTURA to turn in his equipment because he had not worked as an officer for over a year. (R.99: Brief in Opposition, Appenzeller letter, 04/28/93 attached thereto as Exhibit "A-7".) VENTURA was never provided the option of taking retraining but was terminated immediately from the force and ordered to turn in his equipment, despite Chief Appenzeller's previous assurance to get VENTURA "back in the saddle again". (R.61: Ventura Depo., p. 298, 299, 300, 306.) On May 14, 1993, VENTURA filed his second charge with the EEOC based on his discharge from the Police Department in retaliation to his ADA claim.

Finally, conditions were too much for VENTURA. After working several days outdoors in high heat and humidity, VENTURA was having difficulty breathing while cleaning catch basins on June 21, 1993. VENTURA called his doctor and met with him at 2:00 p.m. that same day. Because the CITY refused to accommodate VENTURA's asthmatic condition, the doctor recommended VENTURA for disability. (R.60: Sauers Depo., p. 73; R.62: Ventura Depo., p. 338-344; R.99: Brief in opposition, Disability

Recommendation, Exhibit "A-B" attached thereto R.99: Brief in Opposition, Sauers Aff., ¶ 2, Exhibit "D" thereto.)

On December 21, 1993, VENTURA initiated this lawsuit to recover from the CITY, ORNAS, ELLERT, MESSINA and SPILKER for violating the ADA and breaching the Union contract by refusing to accommodate VENTURA's asthmatic condition; for retaliating against him because of his ADA claim; for intentionally exposing him to extreme cold without allowing him to rotate with the rest of the crew; and for intentionally inflicting emotional distress upon him. (R.1: Complaint; R.21: Amended Complaint.) The defendants moved for summary judgment on each of these claims.

On April 18, 1995, the trial court granted the Defendants' Motion for Summary Judgment on VENTURA's ADA and breach of contract claims. (R.89.) The court then dismissed VENTURA's remaining state law claims, without prejudice, for lack of jurisdiction without the federal claims. (Id.) VENTURA appealed this final decision of the district court on May 16, 1995. (R.92.)

All of the issues involved in this appeal were determined by the trial court on Defendants' Motion for Summary Judgment. Thus, this Court's review of the issues is de nova. E.g., Tolton v. American Biodyne, Inc., 48 F.3d 93B, 940 (1995).

The district court inappropriately made a factual determination that VENTURA is not disabled and not

entitled to protection under the ADA. This issue was never even raised on defendants' motion. To the contrary the defendants argued that VENTURA was so disabled that he could not perform the essential functions of his job and that the defendants could not reasonably be expected to accommodate his condition. The record demonstrates the existence of at least a genuine issue of material fact regarding not only VENTURA's disability but the defendants' refusal to reasonably accommodate VENTURA's asthmatic condition. As these are factual issues in genuine dispute, they cannot be properly resolved on summary judgment.

The district court also erred in concluding that the CITY did not retaliate against VENTURA for his ADA claim when VENTURA was discharged from the police force immediately after the EEOC began its on-sight investigation. Directly contrary to the appropriate standards for reviewing summary judgment, the court inferred in favor of the movant that the letter from the Chief of Police to VENTURA, instructing him to "return all of the equipment that the City of Independence Police Department issued [him] as soon as possible" was not a termination letter. (See, R.99: Brief in Opposition, Letter from Chief Appenzeller to John Ventura, dated 04/28/93, Exhibit "A-7" attached thereto.)

VENTURA also claims that the CITY's failure to comply with the ADA constitutes a breach of the CITY's collective bargaining agreement with the Service

Department employees. The trial court dismissed VENTURA's breach of contract claim on summary judgment based on its dismissal of his ADA claims. Thus, to the same extent the court erred in dismissing VENTURA's ADA claims on summary judgment, likewise the dismissal of his contract claim was in error.

Having disposed of VENTURA's claims under federal law, the trial court dismissed VENTURA's remaining two state law claims, without prejudice, for lack of federal jurisdiction. As the court's dismissal of VENTURA's ADA claims was erroneous, the state law claims ought be reinstated as part of this suit.

ARGUMENT

In 1990, Congress enacted the American with Disabilities Act ("ADA") to expand the protection under federal law previously granted by the Rehabilitation Act of 1973 for persons with disabilities. See, 42 U.S.C. § 12101. Among the reasons the ADA has been implemented are that:

1- discrimination against individuals with disabilities persists in such critical areas as employment,housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

2- individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

3- the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

4- the continuing existence of unfair and unnecessary, discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

Id.

The ADA provides protection and redress to disabled individuals in the areas of employment, public services and public accommodations. VENTURA's claims have been

brought under the employment provisions of the ADA, 42 U.S.C. § 12111 et seq.

Under 42 U.S.C. § 12112, an employer is prohibited from discriminating against an individual with a disability in regards to hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment. An employer is also prohibited from retaliating against any individual who has made a charge under the ADA. 42 U.S.C. § 12203.

A person with a disability has:

1- a physical or mental impairment that substantially limits one or more such major life activities of such individual;

2- a record of such impairment; or

3- been regarded as having such impairment.

42 U.S.c. § 12102; 29 C.E.R. § 1630.2(g).

The defendants did not dispute in their Motion for Summary Judgment that VENTURA has asthma or that his condition constitutes a disability within the context of the ADA. Indeed, the crux of the defendants' argument is that VENTURA's condition is so bad that he cannot perform the essential function of his job and that it would impose an undue hardship to accommodate his condition.

An employer is required to make reasonable accommodation to allow a disabled employee to perform his essential job functions, unless the employer can establish

that it would impose an undue hardship on the employer's operations. 42 U.S.C. § 12112(b)(5)(A). The issues to be determined are whether VENTURA is qualified to perform the essential functions of a Maintenance Grade I employee, provided reasonable accommodation is given to his asthmatic condition, as well as whether VENTURA's discharge from the Police Department was in retaliation for his initiating his claims under the ADA.

Summary judgment is not to be a substitute for trial. It is to be rarely granted only when there are no genuine issues for trial and the moving party is clearly entitled to prevail as a matter of law. See, Felix v. Young, 536 F.2d 1126, 1130 (6th Cir. 1976). If questions of fact remain, the motion should be denied and the case should proceed to trial. Id.; see, also, Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catratt, 477 U.S. 317, 323 (1986).

When considering a motion for summary judgment, the evidence must be construed most favorably for the non-moving party who must only show that there exists a genuine issue for trial. See, e.g., Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-1356 (6th Cir. 1984). "[P]apers supporting the movant are closely scrutinized whereas the opponents are indulgently treated." Id. quoting

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d at 427.

As the Supreme Court has explained:

> Our holding on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. [Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).] Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co., 344 U.S. 249 (1948).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513 (1986). The district court erred in entering summary judgment in favor of the defendants on VENTURA's ADA and breach of contract claims as the defendants failed to demonstrate the lack of a genuine issue

of fact or that they were entitled to prevail as a matter of law.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON AN ISSUE WHICH HAD NOT BEEN PRESENTED ON MOTION.

VENTURA maintains that the CITY OF INDEPENDENCE discriminated against him by demoting him to a Maintenance Class III employee and by refusing to reasonably accommodate his asthmatic condition. (R.21: Amended Complaint, ¶ 10-18.) In moving for summary judgment on this claim, the defendants argued that VENTURA's asthmatic condition was so bad that he could not perform the essential functions of a Maintenance Class I employee, even with reasonable accommodations. (R.36: Motion by Defendants for Summary Judgment, p. 18-22.)

In granting summary judgment on this claim, the trial court did not rely on any of the issues raised by the defendants in their motion. To the contrary, while the defendants argued that VENTURA is so disabled that he cannot be reasonably accommodated, the court determined that VENTURA was not disabled at all and consequently not entitled to any protection under the ADA. (R.88: Memorandum and Order, p. 15.)

Summary judgment cannot properly be entered on an issue which has not been raised by the movant. The non-movant's burden to respond with specific facts showing a genuine issue for trial only arises once the moving party has met its initial burden of demonstrating an absence of a

genuine issue for trial. Celotex Corp., 477 U.S. at 323; Felix, 536 F.2d at 1134-35. Indeed, when a movant fails to meet this initial burden, summary judgment must be denied even if no opposing evidentiary matter is provided. Adickes v. S.H. Kress & Co., 398 U.S. 144, 161 (1970); Felix, 536 F.2d at 1135. Because the defendants did not raise on summary judgment any issue with regards to whether VENTURA is disabled under the ADA, VENTURA had no obligation to present any materials at that point establishing this as a genuine issue for trial.

While a court may have the power to enter summary judgment on an issue sue sponte, this is only if the party is on notice to come forward with his evidence on the issue. Celotex, 477 U.S. at 326; see, also, Fountain v. Filson, 336 U.S. 681, 682-83 (1949); Sharlitt v. Gorinstein, 535 F.2d 282, 283-84 (6th Cir. 1976). At no point was VENTURA put on notice, either through the defendants' motion or by the court, that the question of whether his asthma was a disability would be an issue on summary judgment. While VENTURA obviously still has the burden of proving this element at trial, it was not properly considered by the district court as a basis for summary judgment.

As will he discussed further in the following section, there is sufficient evidence in the record to establish that VENTURA is disputably disabled by his asthma under the provisions of the ADA. VENTURA, however, was prejudiced by the court disposing of this issue on summary

judgment without prior notice, when the defendants failed to raise this issue on their own motion.

VENTURA properly responded on summary judgment by presenting specific facts establishing genuine issues for trial on those matters actually raised by the defendants. To the extent it is questioned whether VENTURA is actually disabled, VENTURA could have provided additional testimony of his own or from his medical experts, by way of affidavit, clarifying that his asthma substantially impaired him in the life functions of working, breathing, etc. VENTURA could also have shown the court specific references in depositions already on file that establish the element of his disability.

The trial court, however, never provided VENTURA with this opportunity. While the defendants were arguing that VENTURA is too disabled to be accommodated in his employment, the trial court concluded, on its own, that VENTURA was not disabled at all. As this issue was never raised by the defendants in their motion and the court never provided VENTURA notice that it was considering this issue, the trial court's rendering of summary judgment on VENTURA's first claim, based on this issue, was in error.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT VENTURA'S ASTHMA DID NOT CONSTITUTE A DISABILITY UNDER THE ADA.

Despite the fact that the issue was never raised in the defendants' motion, the district court determined that VENTURA failed to show that he was at least disputably disabled under the provisions of the ADA. According to the trial court, VENTURA failed to show that his asthma limited his ability to breathe, work or other life activities. (R.88: Memorandum and Order, p. 19.)

The definition of handicap or disability under the ADA is broad. See, Taylor v. United States Postal Service, 946 F.2d 1214, 1218 (6th Cir. 1991).[4] Other cases under the ADA and the Rehabilitation Act have found asthma or similar conditions to be disabilities, entitled to protection under federal law. E.g., Milton v. Bob Maddox Chrysler, 868 F.Supp. 320, 325 (S.D. Ga. 1994); Harmen v. Virginia Electric & Power Co., 831 F.Supp. 1300, 1306 (E.D. Va. 1993).

The determination to be made is whether VENTURA's asthma limits him in one or more major life activities. When considering the evidence in a light most favorable to VENTURA, it cannot be determined as a

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[4]"In passing the ADA, Congress specifically intended that the case law established under the Rehabilitation Act be used in deciding cases brought under the ADA." Dutton v. Johnson County Board of County Commissioners, 859 F.Supp. 498, 504 (D. Kan. 1994); citing 42 U.S.C. § 12117(b).

matter of law that VENTURA fails to meet those requirements. See, Milton, 868 F.Supp. at 324.

Contrary to the district court's factual conclusion, there's sufficient evidence on record to establish at least a genuine dispute that VENTURA is limited in one or more major life activities. VENTURA indicated that due to his asthma, he could not be around diesel fumes, high humidity or extreme temperatures and needed to avoid midnight shifts. (R.61: Ventura Depo., p. 37.) This was confirmed by Dr. Kathleen Fagan, a specialist in occupational medicine, who indicated that due to his asthmatic condition, VENTURA needed the following accommodations on his job:

- Driving of gasoline powered vehicles rather than diesel powered vehicles;
- Avoidance of extremes in temperatures or high humidity;
- Providing proper respirator and respirator training for paint jobs or other duties requiring use of or exposure to irritant chemicals, fumes or gases; and
- Providing a clean air environment.

(R.99: Fagan Report, Defendants' Exhibit 9(A), attached to Fagan Deposition and identified at p. 9; Fagan Depo., p. 32, 109-110.)

Dr. James Sauers has been treating VENTURA for his asthma since August, 1992. (R.60: Sauers Depo., p. 14.) Dr. Sauers confirmed that VENTURA suffers from short-

ness of breath, tightness of chest and limitation of his physical activities due to his asthma. (R.61: Sauers Depo., p. 31.) Dr. Sauers also indicates that VENTURA needs to avoid exposure to hydrocarbons (particularly diesel fumes) and extreme temperatures or humidity. (R.99: Brief in Opposition, Sauers Aff., Exhibit "D" attached thereto.)

The limitations on VENTURA's ability to work and breathe is confirmed not only by VENTURA's physicians but by the defendants' physician as well. The CITY twice had VENTURA examined by its own physician, Dr. Bray, regarding his asthmatic condition. (R.56: ornas Depo., p. 26, 27, 28, 33.) Dr. Bray also confirmed that VENTURA should avoid exposure to diesel fumes and not be required to work early morning hours due to his asthma. (R.99: Brief in Opposition, Bray letters, Exhibits "A-3" and "A-5" attached thereto.) Dr. Bray also confirmed that extreme temperatures and Humidity are reliable provokers of VENTURA's asthma. (R.99: Brief in Opposition, Bray letter, Exhibit "A-5" attached thereto.)

VENTURA used to be an avid and accomplished runner. (R.61: Ventura Depo., p. 97-100.) Since the onset of his asthma in 1991, attempts at running have been restricted due to his difficulty breathing. (R.61: Ventura Depo., p. 100.) He has quit playing basketball because of his asthma. (R.61: Ventura Depo., p. 111.) While he does still play the saxophone on occasion, he must sit out when irritation is caused by smoke. (R.61: Ventura Depo., p. 81-82.)

The fact that VENTURA attempts to engage in some normal activities, to the extent his health permits, does not preclude him from being considered disabled.[5] One need not be totally debilitated to be considered disabled. Involvement in work and other activities will not preclude one from being determined to be disabled. Milton, 868 E. Supp. at 324; Watson v. United States, Civil Action No. 84-216, p. S (D.D.C., Jan. 17, 1985) (slip opinion attached.)

The fact that VENTURA's asthma restricts him from working around diesel fumes and in extreme temperatures and humidity substantially limits his ability to work and breathe. The essential issue in this case, as even the defendants have argued, is not whether VENTURA is disabled but whether his limitations can be reasonably accommodated.

Indeed, under the ADA, it is not necessary for VENTURA to establish that he is actually disabled but only that he is "regarded" as disabled. Milton, 868 F.Supp. at 325; 42 U.S.C. § 12102(2)(C); 29 C.F.R § 1630.2(g). In his affidavit to the EEOC and in his deposition testimony, Service Director WAITER ELLERT indicated that VENTURA cannot even perform the essential functions of his job due to his medical condition. (R.49: Ellert Depo., p. 23, 24, 25, 48, 88, 89.) This is purportedly the reason

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[5]Indeed, the purpose of the ADA is to assist disabled individuals in leading as normal a life as possible by making reasonable accommodations.

why VENTURA was demoted from Class I to Class III. (Id. at 48.) The garage foreman, DENNIS MESSINA, doesn't believe VENTURA's even capable of performing the functions of a Class III maintenance employee due to his medical restrictions, the position to which VENTURA was demoted. (R.57: Messina Depo., p. 39, 40.)

While VENTURA maintains that he is able to perform the essential functions of a Maintenance Class I employee, if provided with reasonable accommodation, the fact that his supervisors regard him as unable to do so because of his medical restrictions, is sufficient in itself to establish that VENTURA is disabled and entitled to the protection afforded by the ADA. Milton, 868 F.Supp. at 325.

The trial court erred in concluding that VENTURA is not disabled as a matter of law, as the record demonstrates this is at least a genuine issue for trial. Indeed, with the evidence that the defendants believed VENTURA was unable to perform the essential functions of his job, it seems indisputable that VENTURA was in fact "regarded" as disabled and therefore entitled to the protection under the ADA.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DIVISION

EXCERPTS OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Case No. 1:93-CV-2701
Filed 10/19/94

Pages E-1 thru E-6

. . .because Ventura's condition was diagnosed as reversible and it resulted in only a 4% reduction in pay where he claimed to be 100% disabled, his reclassification was a reasonable accommodation as a matter of law.

B. Assuming, *Arguendo*, That Ventura Had Notified The City Of All His Restrictions, Ventura Was Not "An Otherwise Qualified Individual With A Disability" Since Be Could Not Perform The Essential Functions Of Any Job With Or Without Reasonable Accommodation.

As stated earlier, the ADA does not require employers to provide "reasonable accommodations" to an individual who cannot perform, either with or without reasonable accommodations, the "essential functions" of a job. 42 U.S.C. §12112(b)(5)(A) (reasonable accommodations must be provided to an "otherwise qualified individual"); EEOC & United States Dep't of Justice, Americans with Disabilities Act Handbook, I-60 (1992) (an individual is "otherwise qualified" if the person can perform the essential functions of the job desired once the individual is provided with reasonable accommodations.)

However, an individual is not entitled to absolute accommodation, any "possible" accommodation, nor the accommodation of his choice. Vande Zande v. State of Wisconsin Dept. of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994); Harmer v. Virginia Elec. and Power Co., 831

F. Supp. 1300, 1307 (E.D. Va. 1993); Davis v. York Int'l. Inc., 1993 Westlaw 524761, No. HAR 92-3545 (D.Md. November 22, 1993) (attached at Tab G); 29 C.F.R. App. §1603.9, at 415. Therefore, if there is no job available for an employee to perform in light of the employee's disability, the employee can be terminated. Rosiak v. United States Dep't of Army, 679 F. Supp. 444 (M.D. Pa. 1987), aff'd without opinion, 845 F.2d 1014 (3d Cir. Pa. 1988); Lillback v. Metropolitan Life Ins. Co., 1994 Westlaw 107323 (Ohio App. 2 Dist.) No. 14085 (Montgomery City March 30, 1994), at 8 (attached at Tab F).

In Rosiak, the plaintiff suffered from a peculiar handicap where exposure to cement caused him (1) to act erratically, (2) to suffer dizzy spells, and (3) to suffer chest pains; Id.. at 446. The Army attempted to accommodate him by assigning him to a different work station. Id. This assignment was unsuccessful as the plaintiff complained about exposure to dust and fumes. Id. The Army then attempted to minimize the plaintiff's exposure to the fumes by assigning him to jobs that could be completed outside. Id. However, the plaintiff refused this assignment due to the diesel fumes of passing trucks. Id. Eventually, the Army terminated the plaintiff. The Rosiak court granted the Army summary judgment and held that plaintiff was not an otherwise qualified individual because "[t]he dustless and fumeless working environment that t the plaintiff] led the agency to believe he required simply could not be

provided." Id. at 445, 451. See also Harmer, 831 F. Supp. 1300 (employee not entitled to complete smoke-free work environment as reasonable accommodation.)[1]

In the case at bar, Ventura told PERS some time after June, 1993, that he could only work in a dustless and fumeless environment. (Amended Complaint, at a, 12-14; Ventura Deposition, at 352-57.) In fact, in pursuing his claim for a PERS disability, Ventura identified the following items as causing breathing problems for him and which he must avoid:

> ...diesel fumes, midnight shifts, humidity, cold weather, dust, oil based paints, thinners, acid fumes, asphalt vapors, floor removers/strippers, welding fumes, heat with certain variables, smoke, cleaning solvents, carbon monoxide and grasses on occasion.

(Ventura Deposition, at 347-57.) Ventura allegedly had to avoid these items up until the day he voluntarily left his

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[1] As in Harmer, Ventura's medical expert, Dr. Sauers, has not inspected the Service Garage and has no information about its air quality other than that provided by Ventura. (Sauers Deposition, at 45). As such, Dr. Sauers' conclusory opinions cannot raise a genuine issue of fact. 831 F. Supp. at 1307.

employment at the Service Garage on June 21, 1993. Ventura's complaints, which are strikingly similar to the complaints in Rosiak, would have made it impossible for the City to provide an accommodation that could have kept him in a Grade I or Grade III position because all Service Department employees will always be either indoors near dust or fumes or outdoors when it is cold, hot or humid. (Ellert Affidavit, at ¶21; Ornas Deposition, at ¶29; Messina Deposition, at ¶5.)[2]

Ventura cannot be viewed as a "qualified individual" since he is receiving total and permanent disability benefits from Ohio's PERS. In Larkins v. CIBA Vision Corporation, -- F. Supp. --, 1994 Westlaw 370138 (N.D.Ga. 1994) at Tab H), the defendant con-tended that no accommodation can be made for an employee who is entirely unable to work because of being declared "totally disabled from work." (Slip op., at 8.) Accordingly, the court found that the plaintiff was "not a qualified individual under the ADA because she cannot perform the essential functions of [her] position with or without reasonable accommodation." (Slip op., at 11.) Here, as of July 31, 1993, PERS declared that Ventura was totally disabled from

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[2] Ironically, Ventura argues that despite his being totally and permanently disabled, he feels he could perform a job if it were "patch-worked" together. (Ventura Deposition, at 364-66.)

work due to a "presumed permanent mental or physical incapacity for the performance of this] present duty or similar service." (See Ohio Administrative Code §145-11-04; Ventura Deposition, at 396.)

Finally, Ventura's alleged work restrictions are so overwhelming that he cannot perform, even with reasonable accommodations, the majority of the duties expected of a Grade I Service Department employee or even those of a Grade III position. Thus, Ventura is not a "qualified individual" within the meaning of the ADA and he was not entitled to any accommodation, if all facts would have been known.

C. No Material Issue Exists As To Ventura's Claim 1 Allegations Regarding The Department's Ventilation System. As such, Summary Judgment Is Warranted.

Claim 1 of Ventura's Amended Complaint includes allegations that the Service Department does not have a properly functioning ventilation system and that this condition was the cause of Ventura's asthma. (Amended Complaint, at ¶11.)

Even if Ventura could establish a causal connection between the ventilation system and his asthma, his claim here would still be barred. The City vigorously maintains

that the ventilation system in the Service Garage was designed and operated in accordance with all applicable codes and is prepared to prove as such. However, the condition of the ventilation system is irrelevant to the Court's consideration of the "causal connection" issue. It is well established that an employee who suffers a work place injury or disease[3] has, as an exclusive remedy, the Ohio Workers Compensation System. (see Ohio Constitution, Article II, Section 35; Ohio Revised Code §4123.74; and Bridges v. Nat'l Engineering & Contracting Co. 49 Ohio St.3d 108 (1990).) Indeed, on January 14, 1993, Ventura filed an asthma based claim against the City with the Ohio Workers Compensation System. (See Ventura Deposition, at 252-253; Claim of John Ventura, Workers Compensation Claim No. ODPE 12271, filed January 14, 1993, Spilker Affidavit, at ¶10 and Exhibit 2.) Consequently, since Ventura is actively pursuing his claim within the Ohio Workers Compensation System, he is not entitled to any recovery based on his allegations in this Court that the Department's ventilation system is inadequate. Therefore, summary judgment in favor of the City is appropriate as a matter of law.

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[3] Asthma would be a disease as opposed to an injury. (See Ohio Revised Code 4123.01(F).)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EXCERPTS OF DEPOSITION
OF JOHN VENTURA

Case No. 1:93-CV-2701

Pages F-1 thru F-9

that the ventilation system in the Service Garage was designed and operated in accordance with all applicable codes and is adequate. However, the condition of the ventilation system is irrelevant to the Court's consideration of the "unidentified" issue. It is well established that an employee who suffers a work place injury or disease has, as an exclusive remedy, the Ohio Workers' Compensation System. See Ohio Constitution, Article II, Section 35; Ohio Revised Code 4123.35; and Bridges v. Nat'l Engineering & Contracting Co. 49 Ohio St.3d 198 (1990).) Indeed, on January 19, 1993, Ventura filed an asthma based claim against the City with the Ohio Workers Compensation System. (See Ventura Deposition at 252-253; Compensation Claim No. OD [illegible] 14, 1993; Spilker Affidavit, at ¶10 and Exhibit 2.) Consequently, since Ventura is actively pursuing his claim within the Ohio Workers Compensation System, he is not entitled to any recovery based on his allegations in this Court that the Department's ventilation system is inadequate. Therefore, summary judgment in favor of the City is appropriate as a matter of law.

1/ Asthma would be a disease as opposed to an injury. (See Ohio Revised Code 4123.01(F).)

* * *

[Page 103-104]

A. In 91?
Q. Yes.
A. It's hard to say. I'd ride with the kids.
Q. Do you swim now in 94?
A. Yes.
Q. Do you swim laps now?
A. I try to swim more of the lap type process rather than just swim and taking a break.
Q. Where to you swim?
A. I swim at the Civic Center.
Q. That's an indoor pool?
A. Yes, at the City of Independence.
Q. How often do you go there and swim?
A. I try to go -- if I don't have my boys with me, I'll try to go every night.
Q. And what's your routine there?
A. My routine is usually before I go, I'll take my medication and I'll go there and then I'll use the whirlpool for about 10, 15 minutes and then I'll swim in the pool.
Q. For how long?
A. About 15 minutes, 20 minutes, something like that.
Q. How many laps do you do?
A. Well, I can't do straight laps, even in a small pool. It's kind of difficult for me to do that. I try to do

about six or seven laps. And that's a smaller pool than Elmwood Pool.

Q. Do you run still?

A. No.

Q. When was the last time you ran

A. Are you speaking like a three to six-mile type race or type run?

Q. Jogging.

A. Is that what you're referring to?

Q. Yes.

A. Might have been last summer as best I can recollect.

Q. Did you run in 1992?

A. A little bit.

Q. How about in 93?

A. I tried. I didn't run that often because I had a difficult time breathing.

Q. When did you try to run in 93 when you had the difficult time breathing?

A. In the spring when the weather warmed up.

Q. What month?

* * * *

[Pages 147-150]

(Luncheon recess taken.)

Q. I think where we left off, Mr. Ventura, was with Exhibit AAA, which was the slip from Weiner saying you should not ride diesel vehicles, correct?

A. I should not what?

Q. Operate diesel vehicles.

A. "Please excuse him from driving trucks if possible if he has problems."

Q. Did Dr. Weiner prescribe medication for you for your asthma?

A. Yes.

Q. What did he prescribe?

A. Ventolin.

Q. What is Ventolin?

A. It's an inhaler.

Q. What else did he prescribe?

A. I was on Asthmacort also.

Q. What is Asthmacort?

A. It's also an inhaler.

Q. And when did he prescribe that medication for you?

A. After I wad diagnosed. I don't remember the exact date. It was in December of 91.

Q. How long have you been taking Ventolin?

A. Ever since that day.

Q. How about the Asthmacort?

A. I stopped taking that because it was making my throat bleed.

Q. Was that like one of the side effects of it?

A. Yes. It's very strong medication.

Q. And it made your throat bleed?

A. Yes. I was on another inhaler that he gave me. I can't remember which one it was now.

Q. Have you been on any other medication?

A. I'm on the Ventolin. I'm on the Atrovent inhaler.
Q. Atrovent?
A. Yes.
Q. How long have you been on that?
A. A couple years.
Q. Okay.
A. And I'm on Vanceril also.
Q. How long have you been on Vanceril?
A. At least a couple years. I'm also using Albuterol Sulfate through an aerosol machine.
Q. And what is the name of that medication?
A. Albuterol Sulfate. It's a premeasured liquid that you put into the aerosol inhaler and the machine makes it like an aerosol, like a midst.
Q. That you breathe in through your nose?
A. Through your mouth.
Q. How long have you been on that?
A. I believe it was February of 94.
Q. Who prescribed that for you?
A. Dr. Sauers.
Q. Can you remember any other medications you've been on since December of 91?
A. Not offhand.
Q. Were you ever on Uniphyl?
A. If I was, I can't remember.
Q. Were you ever on Xanax?
A. Yes.
Q. Valium?

A. No.

Q. How long were you on the Xanax?

A. I didn't take it every single day. Off and on for a couple months.

Q. Who prescribed it?

A. Dr. Sauers.

Q. What else has Sauers prescribed for you?

A. I had another medication he prescribed.

Q. Aerobid?

A. No.

Q. Did you ever take Aerobid?

A. Yes, I did with -- I did take Aerobid. I believe that was with Dr. Weiner. That was inhaler also.

Q. And --

A. Boy, I can't remember the one medication I was on when I had the respiratory infection. I'm sorry, I can't remember it.

Q. Amoxicillian? Isn't that what you took for your upper respiratory infection?

A. I had Amoxicillian, too, I believe. There was another medication other than the Amoxicillian.

Q. Proventil? Were you on that?

A. No.

* * * *

[Pages 259-260]

...system worked on and revamped. And under the construction that it was revamped, it was never completed.

And this is going back at least ten years ago.

Q. Was Dottie the service director ten years ago?

A. Dottie was the assistant administrative director I believe her title was at the garage. We also answered to Dottie. And I worked a couple days on that system with Lou Kapusta.

Q. Let's go back to the recycling. That's one instance where you say you were forced to be exposed to diesel fumes?

A. Yes.

Q. And on certain occasions you would not assist in dumping the recyclable bins and you would go where?

A. If we had oil, recyclable oil, that had to be dumped, they had a big container underground. And when I'd come in, I would either take the oil off the trailer and go outside and dump it. And I would go up into the locker room after I did those jobs and I would take my medication, and I would stay up in the locker room until we were ready to leave again. Usually it took about 15 minutes to unload the recyclable materials.

Q. How long did it take you to take your medication?

A. Approximately ten minutes.

Q. What do you do when you take your medication? You just put the inhaler --

A. Put the inhaler up to your mouth and you breathe it in and hold your breath for awhile and then you

exhale. Then you give it about a minutes, 30 seconds to a minute, and then you do it again. And I would do that with the three inhalers that I use.

Q. You did three at a time?

A. I do three at a time four times a day and I still do it.

Q. Did you do it today?

A. Yes.

Q. When?

A. When we got finished here, I went in the bathroom over there and I took them in there.

Q. You took all three of them?

A. Yes.

Q. At one time?

A. Yes.

Q. Which three did you take at one time?

A. The Ventolin. They're not all done at the same time. They're not done -- I don't put three up to my mouth.

Q. No, but you do three consecutively?

A. Yes.

Q. Ventolin. What other two?

A. The Atrovent. Would you like to see them? I've got them with me.

Q. No, I've seen them before. Were you ever disciplined for not assisting the other workers in dumping the recyclables.

A. Verbally I was.

Q. By who?

A. By Walt and Dennis.

Q. What did they say?

A. They told me that my job duty is to help the crew and I'm not carrying my end of the load and I should get gown there and help them out. And I explained to them I could not work in the Garage. I could not be in there with the fumes.

Q. Did you thereafter work in the garage?

A. No.

Q. You continued to go up to the locker room?

A. Well, after this incident -- that incident was on January 21 of 93 that I told them that I could not work inside the garage.

Q. That's the same day you gave them Dr. Sauers' note, right?

A. That's correct. I mean I told them prior to that on a number of occasions that I wasn't supposed to be in there.

Q. But you gave them Dr. Sauers' note at the same time that they told you to go down and help your coworkers dump the recyclables?

A. They called me upstairs to tell me that, yes.

Q. And then you gave them Dr. Sauers' note?

A. Yes.

Q. Did you just have it in your pocket?

A. I told you I had it in my possession. I had it in my locker room. Jack Filak told me not to give them that letter yet. Jack Filak had a copy of it. I did what my union...

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C.S. @ 12101 (1997)

Pages G-1 thru G-4

APPENDIX G

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS @ 12101 (1997)

@ 12101. Congressional findings and purposes

(a) Findings. The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability

have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is Justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting era- dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

address the major areas of discrimination faced day-to-day by people with disabilities.

HISTORY: (July 26, 1990, P.L. 101-336, @ 2, 104 Stat. 328.)

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR
INDIVIDUALS WITH DISABILITIES

42 U.S.C.S. @ 12102 (1997)

Pages H-1 thru H-2

APPENDIX H

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS @ 12102 (1997)

@ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment: or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

HISTORY: (July 26, 1990, P.L. 101-336, @ 3, 104 Stat 329.)

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C.S. @ 12111 (1997)

Pages I-1 thru I-5

APPENDIX I

Appx. I - 2

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS @ 12111 (1997)

@ 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 <=1> (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more

calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs.

(A) In general. The term "illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act <==2> (21 U.S.C. 812). Such term does not include the

use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [<=3> 21 USCS @ 812].

(7) Person, etc. The terms "per cation", "employment agency", "commerce", and "industry", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 <=4> (42 U.S.C. 2000e).

(8) Qualified individual with a "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility: the effect on expenses and resources, or the

impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

HISTORY: (July 26, 1990, P.L. 101-336, Title I, @ 101, 104 Stat. 330; Nov. 21, 1991, P.L. 102-166, Title I, $ 109(a), 105 Stat. 1077.)

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 U.S.C.S. @ 12112 (1997)

Pages J-1 thru J-7

APPENDIX J

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS @ 12112 (1997)

@ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an

employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who if an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accom-

modation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign

country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant

is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations,

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are amen only in accordance with this title.

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be

job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part or an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

HISTORY: (July 26, 1990, P.L. 101-336, Title I, @ 102, 104 Stat. 331; Nov. 21, 1991, P.L. 102-166, Title I, @ 109(b)(2), 105 Stat.1077.)

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 29. LABOR; SUBTITLE B; CHAPTER XIV; PART 1630

29 C.F.R. 1630.2

Pages K-1 thru K-12

APPENDIX K

TITLE 29. -- Labor
SUBTITLE B -- Regulations Relating to Labor
Chapter XIV -- Equal Employment Opportunity Commission
Part 1630 00 Regulations to Implement The Equal Employment Provisions of The Americans With Disabilities Act

29 CFR 1630.2
@ 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-41.

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer--

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more

calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include--

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation --501(c) of the Internal Revenue Code of 1986.

(f) Employee means ad by an employer.

(g) Disability means, with respect to an individual--

(1) A physical or men substantially limits one or more of the major life activities Dual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment. (See @ 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine: or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits--

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average

person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working--

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs);

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental Impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See @ 1630.3 for exceptions to this definition).

(n) Essential functions--

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. -

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists

is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job: and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires: or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by

employees readily accessible to and sable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship--

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by covered entity, when considered in light of the factors set forth in

paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic

separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an

individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

HISTORY: 56 FR 35734, July 26, 1991.

AUTHORITY: 42 U.S.C.12116.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TITLE 29. -- INTERPRETIVE GUIDANCE TO

C.F.R. § 1630.2(j)

Pages L-1 thru L-2

APPENDIX L

TITLE 29

Interpretive Guidance to 29 C.F.R. § 1630.2(j)

* * *

Part 1630 notes several factors that should be considered in making the determi-nation of whether an impairment is sub-stantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the im-pairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the im-pairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impair-ment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a

major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

* * *

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

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APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE WALL STREET JOURNAL

February 18, 1997
Page 1 Column 5

Pages M-1 thru M-1

The Wall Street Journal
February 18, 1997
Page 1, Column 5

EMPLOYERS WIN About 90% of lawsuits filed by workers under the americans with disabilities act, the american bar association says. The lawyers' group says workers often can't provide the level of proof needed to prevail. Workers must show that they are capable of performing their jobs but at the same time that their disability affects them substantially. "It's a Catch-22," says John Parry, director of the ABA's Commission on Mental and Physical Disability Law.